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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 443

UNITED STEELWORKERS OF AMERICA,
PETITIONER,

vs.

WARRIOR & GULF NAVIGATION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1959
CERTIORARI GRANTED DECEMBER 7, 1959

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Style of Cause

Civil Action No. 2100

UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association,

versus

WARRIOR & GULF NAVIGATION COMPANY, a corporation.

COMPLAINT—Filed October 16, 1958

I.

Plaintiff, a labor union, is an unincorporated association whose duly authorized agents are engaged in representing, in the Southern District of Alabama, employees who are and have been employees of defendant in an industry affecting commerce within the meaning of the Labor [fol. 2] Management Relations Act of 1947. Defendant is a corporation doing business in and having its principal place of business in Chickasaw, Mobile County, Alabama, within this District. Defendant has annually purchased large amounts of raw materials from and shipped large amounts of finished products to points outside the State of Alabama. This is a suit based upon violation of and seeking performance of a contract between a labor organization representing employees in an industry affecting interstate commerce as defined in said Act, as more fully hereinafter appears, and arises under said Act regulating commerce. (29 U.S.C. Section 185; 28 U.S.C. Section 1337.)

II.

On or about September 25, 1956, defendant executed a contract with plaintiff in writing. This contract covered and was executed by plaintiff as collective bargaining representative for certain employees of defen-

dant at its Chickasaw, Alabama, terminal, including the maintenance employees. A copy of said contract is attached hereto as Exhibit "A".

III.

In accordance with the provisions of said contract, a grievance was filed on, to-wit, August 22, 1958, by plaintiff and a large group of then-working and laid-off maintenance employees alleging that defendant was contracting out maintenance work covered by the aforementioned agreement to firms who were not covered by the aforementioned agreement. Plaintiff and defendant were unable to settle said grievance in the first four (4) steps of the procedure [fol. 3] set out in Section 10(A) of the aforementioned contract. Plaintiff has duly requested defendant to arbitrate said grievance pursuant to the provisions of Section 10(A)(Fifth) of the aforementioned agreement, but defendant has failed and refused to arbitrate said grievance as required by Section 10(A)(Fifth) of said contract.

IV.

Plaintiff further alleges that some maintenance employees of defendant covered by the aforesaid contract are laid off due to alleged lack of work; that some of those employees would not be laid off unless defendant were contracting out work which is included in the collective bargaining contract between plaintiff and defendant; and that the aforementioned employees on lay-off status will eventually lose their seniority rights and status as employees of defendant under Section 9, Clause (d) of the aforementioned agreement unless the aforementioned grievance is arbitrated.

V.

Plaintiff alleges that as a result of the above-described omissions and breaches of contract on the part of defendant, plaintiff and the maintenance employees whom it represents have suffered substantial and irreparable injury; and that plaintiff and, particularly, the employees

whose seniority rights are jeopardized by the contracting-out of work are without adequate remedy at law and will suffer immediate, continuing and irreparable injury, loss and damage unless the defendant is ordered specifically to perform the aforementioned contract and, in particular, [fol. 4] Section 10(A)(Fifth) thereof, and is restrained from continuing to refuse to carry out its obligations under said contract.

VI.

Plaintiff submits to the jurisdiction of this Court and offers to do equity.

Wherefore, plaintiff prays:

1. That its right to arbitration of said grievance be determined.

2. That defendant specifically be required to perform Section 10(A)(Fifth) of said contract, particularly with respect to said contracting-out grievance which is heretofore described.

3. That defendant be restrained from in any manner failing or refusing to perform its obligations under said Section 10(A)(Fifth) and particularly with respect to said contracting-out grievance.

4. That defendant be temporarily restrained and enjoined by injunction of this Court and in the form prayed above, and that upon appropriate determination of this cause said injunction be made final.

5. That plaintiff may have such other and further relief as by this Honorable Court may be deemed just and equitable in the premises, all at the costs of defendant.

[fol. 5] 6. That appropriate process may issue commanding defendant to answer this Bill of Complaint and to abide by such Decree as this Honorable Court may make in the premises.

Arthur J. Goldberg, General Counsel United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D. C.;

David E. Feller, Assoc. Gen. Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D. C.;

Cooper, Mitch, Black & Crawford, By Hugo L. Black, Jr., 1329 Brown-Marx Bldg., Birmingham 3, Alabama,

Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 6]

EXHIBIT "A" TO COMPLAINT

Agreement Between Warrior & Gulf Navigation Company and United Steelworkers of America, AFL-CIO.

Maintenance Men and Harbor Tug Barge Men
Chickasaw Terminal.

September 25, 1956.

Termination of Contract, September 25, 1959.

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[fol. 7] **Agreement Between Warrior & Gulf Navigation Company and United Steelworkers of America, AFL-CIO.**

Maintenance Men and Harbor Tug Barge Men, Chickasaw Terminal.

This Agreement dated September 25, 1956, by and between Warrior & Gulf Navigation Company, hereinafter referred to as the Company, and the United Steelworkers of America, AFL-CIO, hereinafter referred to as the Union.

Witnesseth:

Section 1.

Intent of Parties.

It is the intent and purpose of the parties hereto to set forth herein the basic agreement covering rates of pay and conditions of employment to be observed between the parties herewith and to establish a procedure for prompt and equitable adjustment of grievances and eliminate all interferences to efficient Company operations. It is understood that this Agreement applies only to maintenance employees and harbor tug barge men at the Company's Chickasaw, Alabama, Terminal. The term "employees" as used in this Agreement shall accordingly include only such personnel for which the Union has the bargaining rights as certified by the National Labor Relations Board.

[fol. 8] Section 2.

Recognition.

The Company recognizes the Union as the exclusive collective bargaining agency for those employees as defined in Section 1. The Company also recognizes and will not interfere with the rights of its employees to become members of the Union. There shall be no discrimination, interferences, restraint, or coercion by the Company or any of its agents against any employees because of membership in the Union. The Union agrees not to intimidate or

coerce employees into membership, and that neither it nor any of its officers or members will engage in any Union activities on Company time or will engage other employees in any Union activities while the said employees are on Company time.

Section 3.

Illegal Suspension of Work.

A strike or stoppage of work on the part of the employees represented by the parties signatory hereto shall be a violation of this Agreement, and there shall be no strikes, work stoppages, interruptions, or impeding of work. Likewise, a lock-out on the part of the Company shall also be a violation of this Agreement.

[fol. 9]

Section 4.

Union Membership and Checkoff.

A. Union Membership:

1. Each employee who on the effective date of this Agreement is a member of the Union in good standing and each employee who becomes a member after that date shall, as a condition of employment, maintain his membership in the Union.

2. Each employee hired on or after September 25, 1956, shall, as a condition of employment, beginning on the 30th day following the beginning of such employment or the effective date of this Agreement, whichever is the later, acquire and maintain membership in the Union.

3. On or before the last day of each month the Union shall submit to the Company a notarized list showing the name of each employee who shall have become a member of the Union in good standing other than through the procedures as provided for in Section 2 above since the last previous list of such members was furnished to the Company. The Company shall continue to rely upon the membership lists which have been certified to it by the

Union as of June 1, 1950, subject to revision by the addition of new members certified to it by the Union between such date and the date of this Agreement and to the deletion of the names of employees who have withdrawn from membership during such period.

[fol. 10] B. Checkoff:

1. The Company will check off monthly dues, assessments and initiation fees, each as designated by the International Secretary-Treasurer of the Union, as membership dues in the Union, on the basis of individually signed voluntary checkoff authorization cards in forms agreed by the Company and the Union.

2. The Company will suggest that each new employee, when he signs an application for Union membership, as provided for in Sub-section A-2 above, voluntarily execute at the same time an authorization for the checkoff of Union dues in the form agreed upon. It is further understood that if any such employee mails to the Company a written notice of his election not to become a Union member in the manner and within the time limits specified in such Subsection A-2, any such authorization for deduction of dues which he may have signed shall be of no effect. A copy of such authorization card for the checkoff of union dues which shall have become effective as a result of the expiration of 30 days from the date of employment without receipt of such written notice from the employee shall be forwarded to the Financial Secretary of the Local Union along with the membership application of such employee.

3. New checkoff authorization cards, other than those provided for by Sub-section B-2 above, will be submitted to the Company through the Financial Secretaries of the Local Unions at intervals, no more frequent than once each month. On or before the last day of each month, the Union shall submit to the Company a summary list of cards transmitted in each month.

[fol. 11] 4. Deductions on the basis of authorization cards submitted to the Company shall commence with respect to dues for the month in which the Company receives such

authorization card or in which such card becomes effective, whichever is later. Dues for a given month shall be deducted from the first pay closed and calculated in the succeeding month.

5. In cases of earnings insufficient to cover deduction of dues, the dues shall be deducted from the next pay in which there are sufficient earnings, or a double deduction may be made from the first pay of the following month, provided however that the accumulation of dues shall be limited to two months. The International Secretary-Treasurer of the Union shall be provided with a list of those employed for whom double deduction has been made.

Section 5.

Wages.

Rates of pay for all employees covered by this Agreement shall be as follows:

Effective September 25, 1956

	Per Hour
Mechanics	$2.34
Mechanics Helpers	$1.82
Laborers	$1.715
Harbor Tug Barge Men	$1.82

Effective September 25, 1957

	Per Hour
Mechanics	$2.43
Mechanics Helpers	$1.89
[fol. 12] Laborers	$1.785
Harbor Tug Barge Men	$1.89

Effective September 25, 1958

	Per Hour
Mechanics	$2.52
Mechanics Helpers	$1.96
Laborers	$1.855
Harbor Tug Barge Men	$1.96

All of the above rates are to supersede the old rates which prevailed prior to the date of this Agreement. These obsolete rates were as follows:

	Per Hour
Mechanics	$2.24
Mechanics Helpers	$1.72
Laborers	$1.615
Harbor Tug Barge Men	$1.72

This section is intended only to provide a basis for calculating earnings and shall not be construed as a guaranty of work.

Cost-of-Living Adjustment:

1. If the Consumer Price Index of the Bureau of Labor Statistics, U. S. Department of Labor (1947-1949 100), hereafter referred to as the BLS Consumer Price Index, shall increase from the September 25, 1956, level of 117.1 to a level above 117.4, there shall be added to the straight-time hourly earnings of each employee a cost-of-living adjustment in accordance with the following table and provisions:

[fol. 13]

BLS Consumer Price Index	Cost-of-Living Adjustment
117.4 or less	None
117.5—117.9	1¢ per hour
118.0—118.4	2¢ per hour
118.5—118.9	3¢ per hour
119.0—119.4	4¢ per hour

and so forth, with a one cent change in the Adjustment for each 0.4 or 0.5 point change in the Index, whichever is appropriate, based on the sequence of changes set forth in the above table.

2. Changes in any Adjustment shall be made, if appropriate, only commencing with the first pay period beginning on or after each March 1 and October 1, beginning March 1, 1957, and shall be based on the first published

BLS Consumer Price Index as of the prior January 15 and August 15 respectively. The amount of the change in the Cost-of-Living Adjustment shall be the difference between the amount provided in the above table and any Cost-of-Living Adjustment already in effect pursuant to this Sub-section.

3. Notwithstanding any decrease in the BLS Consumer Price Index, there shall not be any decrease in any existing Cost-of-Living Adjustment in accordance with the above table, unless the amount of the decrease in the Adjustment under such table is at least 2 cents, at which time the full amount of the appropriate decrease shall be made.

4. If the BLS Consumer Price Index for any January 15 or August 15 shall not be available by the following [fol. 14] March 1 or October 1 as the case may be, any change in the Adjustment pursuant to such later reported Index shall be made effective as of the pay period beginning on or after March 1 or October 1 which would have been applicable had the Index not been published late.

5. If the BLS Consumer Price Index in its present form and calculated on the same basis shall be revised therefrom or discontinued, the parties shall attempt to adjust this clause, or if agreement is not reached, the parties shall request the Bureau of Labor Statistics to provide an appropriate conversion or adjustment, which shall be applicable as of the appropriate adjustment date and thereafter.

Section 6.

Hours of Work.

The eight hour day and the forty hour week heretofore established by the Company shall remain in effect and the Company shall continue to pay time and one-half for all overtime in excess of eight hours in any one day or for all overtime in excess of forty hours in any one week.

At the option of the Company, a day may be either a calendar day or any twenty-four hour period.

By mutual consent of both parties, a week may be either a calendar week or any regularly established seven-day period.

[fol. 15] No employee shall be worked more than six consecutive days without twenty-four hours rest, except in cases of extreme emergency.

Time and one-half shall be paid for all time worked (sic) ly overtime for the same hours so worked.

An employee shall not be paid both daily and weekly overtime for the same hours so worked.

This section is intended only to provide a basis for calculating overtime and shall not be construed as a guaranty of hours of work per day or per week.

When employees are directed to work and, due to rain or other interference, also change in plans, no work is begun, employee will be dismissed and allowed two (2) hours time at his regular established rate.

In the event an employee actually begins work and by reason of weather interference or other cause is prevented from completing his regular shift, he shall be allowed a minimum of four (4) hours at his regular established rate. Any service performed in excess of four (4) hours shall be paid for, to the nearest quarter hour worked.

The above time allowed but not worked shall not for the purpose of these regulations be considered as overtime.

Allowance for Jury Service:

An employee who is called for jury service shall be excused from work for the days on which he serves and [fol. 16] he shall receive, for each such day of jury service on which he otherwise would have worked, the difference between 8 times his average straight-time hourly earnings (as computed for holiday allowance) and the payment he receives for jury service. The employee will present proof of service and of the amount of pay received therefor.

Section 7.

Irregular Work.

When an employee absents himself from his work for a period of two days without the consent of the Company, other than because of proven sickness or a satisfactory explanation, he may be discharged. When any employee

makes a habit of laying off for single days other than because of proven sickness and continues to do so after having been warned by the Company, he shall be subject to discharge.

Section 8.

Vacations.

To be eligible for a vacation in any calendar year during the term of this Agreement, the employee must:

a. Have one year or more of continuous service; and

b. Not have been absent from work for six consecutive months or more in the preceding calendar year; except that in case of an employee who completes one year of [fol. 17] continuous service in such calendar year, he shall not have been absent from work for six consecutive months or more during the 12 months following the date of his original employment; provided, that an employee with more than one year of continuous service who in any year shall be ineligible for a vacation by reason of the provisions of this paragraph as a result of an absence on account of layoff or illness shall receive one week's vacation with pay in such year if he shall not have been absent from work for six consecutive months or more in the 12 consecutive calendar months next preceding such vacation.

An eligible employee who has attained the years of continuous service indicated in the following table in any calendar year during the term of this Agreement shall receive a vacation corresponding to such years of continuous service and, effective January 1, 1958, extra vacation as shown in the following table:

Years of Service	Vacation	Extra Vacation Effective January 1, 1958
1 or more	1 week	0
3 or more	1 week	½ week
5 or more	2 weeks	0
10 or more	2 weeks	½ week
15 or more	3 weeks	0
25 or more	3 weeks	½ week

The term continuous service as used above means service which is unbroken in continuity by (a) quit, (b) discharged for proper cause, (c) permanent shutdown of operations [fol. 18] where there is a break in employment of two years or more, (d) absence due to lay off or physical disability, either of which continues for more than two years. Continuous service shall not be considered broken by absence of any employee who subsequent to May 1940 entered the military, marine, or naval service of the United States, and who retains re-employment rights under the law and complies with requirements of law as to re-employment and is reemployed. Continuous service shall include only service with the Warrior & Gulf Navigation Company or with the predecessor company (Tennessee Coal, Iron & Railroad-Water Transportation Department), whose obligations were assumed by the Warrior & Gulf Navigation Company when it acquired the water transportation property and related interests of this firm. Vacations granted under this section will be paid the employee at his average rate of earnings per hour for the four weekly pay periods closed and calculated immediately preceding the vacation period. The total hours of vacation pay will be the average hours they worked per week during the four week period, but not less than forty hours or more than forty-eight hours for each weekly vacation period. Employees entitled to one week's vacation will be required to take it in a single uninterrupted period. Employees entitled to two weeks' vacation may be required to either take such vacation in a single period, or in two weekly periods. Employees entitled to three weeks' vacation may be required to either take such vacation in a single period or in weekly periods spaced as may be necessary, to conform with the following requirements: vacations will, so far as possible, be granted at times most desired by the employee, but the final right to allotment of [fol. 19] all vacation periods is exclusively reserved to the Company in order to insure an orderly operation.

Section 9.

Seniority.

It is understood and agreed that in all cases of increase or decrease of forces, and promotion, the following factors shall be considered:

(1) Ability to perform the work.

(2) Physical fitness.

(3) Continuous service.

Promotions shall be from Laborer to Mechanic Helper. Only where factors (1) and (2) are relatively equal shall length of continuous service be the determining factor. The seniority rating of all employees covered by this Agreement shall be determined by the continuous service record with the Warrior & Gulf Navigation Company or with the predecessor company (Tennessee Coal, Iron & Railroad—Water Transportation Department) whose obligations were assumed by the Warrior & Gulf Navigation Company when it acquired the water transportation property and related interests of this firm.

The term "continuous service" as used above means service which is unbroken in continuity by (a) quit, (b) discharge for proper cause, (c) permanent shutdown of [fol. 20] operations where there is a break in employment of two (2) years or more, (d) absence due to lay off or physical disability either of which continues for more than two (2) years. Continuous service shall not be considered broken by absence of any employee who subsequent to May 1940 entered the military, marine or naval service of the United States and who retains re-employment rights under the law and complies with requirements of the law as to re-employment and is reemployed.

New employees have no seniority rights and may be laid off without regard to their length of service during the first thirty (30) working days of employment.

Old employees promoted to new job classifications have no seniority rights in such job classification and may be returned to their previous job classification without regard to their length of service during the first thirty (30) work-

ing days of employment in the new job classification. Seniority shall start and be calculated beginning with the first day on the new job or new assignment provided such job or assignment is retained beyond the 30th day of employment in this job classification.

The Company will within sixty (60) days of execution of this Agreement provide each affected employee with a record of his seniority as of the day the list is issued. Any employee who has grievance with regards to such a record may present the same within thirty (30) days thereafter and the grievance shall be adjusted under the Grievance [fol. 21] and Arbitration committee provided for in this Agreement. Unless a grievance is submitted, the record shall become final.

Employees shall lose all seniority rights if (a) they resign or quit, (b) they are discharged for proper cause, (c) they do not report for work after a period of lay off when notified by registered mail to report, unless within three (3) days, they present a reasonable excuse, (d) they have been laid off for a period of two (2) years or more.

Leave of absence may be given in writing by the Company at its discretion providing such absence does not exceed a period of ninety (90) days. Full seniority will be retained by employees who may be granted a Leave of Absence under the foregoing conditions.

Section 10.

Adjustment of Grievances.

Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner:

[fol. 22] A. For Maintenance Employees:

First, between the aggrieved employees, and the Foreman involved; Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic.

Third, between a member or members of the Grievance Committee and at the option of such committee a representative of the National Organization of the Union, and the Vice President;

Fourth, between the representatives of the National Organization of the Union and the representatives of the Executives of the Company; and

Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Company and the Union.

B. Harbor Tug Barge Men:

First, between the aggrieved employees, and the Terminal Superintendent.

Second, between a member or members of the Grievance Committee designated by the Union, and the Terminal Superintendent and Personnel Officer.

[fol. 23] Third, between a member or members of the Grievance Committee and at the option of such committee a representative of the National Organization of the Union, and the Vice President.

Fourth, between the representatives of the National Organization of the Union and the representatives of the Executives of the Company; and

Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The

parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection shall be made. The decision of the umpire shall be final. The expense and salary incident to the service of the umpire shall be paid jointly by the Company and the Union.

Pending the hearing of disputes, the employees represented by the parties signatory hereto shall not cease work because of any dispute; and a decision reached at any state of the proceeding shall be binding on both parties thereto; and shall not be subject to re-opening by any other party except by mutual agreement.

Specified periods shall be agreed upon between the Grievance Committee and the Vice President for the presentation of grievances hereunder. Provided, however, that matters pertaining to discharge or other matters that cannot reasonably be delayed until the time of the next regular meeting [fol. 24] may be presented at any time in accordance with the foregoing provision.

The Grievance Committee shall consist of not less than two (2) and not more than four (4) employees in the bargaining unit here involved, designated by the Union, who will be afforded such time off without pay as may be required,

First, to attend regularly scheduled committee meetings,

Second, to attend meetings pertaining to discharges or to other matters which cannot reasonably be delayed until the time of the next regular meeting.

The actual number of members of the Grievance Committee shall be mutually agreed upon between the Vice President and the Union.

Section 11.

Management.

The management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to

relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union.

[fol. 25]

Section 12.

Discharge Cases.

In the event a member of the Union shall be discharged from his employment from and after the date hereof, and he believes he has been unjustly dealt with, such discharge shall constitute a case arising under the method of adjusting grievances herein provided. In the event it should be decided under the rules of this Agreement that an injustice has been dealt the employee with regard to the discharge, the Company shall reinstate such employee and pay full compensation at the employee's regular rate for the time lost. All such cases of discharge shall be taken up within five (5) days from the date of discharge and disposed of as promptly as possible.

Section 13.

Safety and Health.

The Company shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment. Protective devices and other equipment necessary to properly protect employees from injury shall be provided by the Company in accordance with the practice now prevailing.

Section 14.

Holidays.

The following days shall be considered holidays during which there shall be no regular work which can be reasonably deferred:

[fol. 26] New Years.

Mardi Gras Day.

Good Friday.*

*(By local agreement prior to April 1st, this holiday may be substituted for another holiday.)

July 4th.

Labor Day.

Thanksgiving.

Christmas.

Employees required to work on a holiday above enumerated shall be paid at the rate of double the regular rate of pay for all hours worked during such holidays. If the calendar holiday is on Sunday, for the purpose of this Agreement, the holiday shall be the following Monday.

1. Effective as of the date of this Agreement, an eligible employee who does not work on a holiday listed above shall be paid eight (8) times his average straight time hourly rate of earnings (excluding over time premium), during the payroll period in which the holiday occurs provided however, that if an eligible employee who is scheduled to work on such holiday fails to report or perform his schedule or assigned work, he shall become ineligible to pay for the unworked holiday unless he has failed to report or perform such work because of sickness or because of death [fol. 27] in the immediate family (mother, father, including in-laws, children, brothers, sisters, husbands, wives, and grand parents), or because of similar good cause.

2. The term "eligible employee" as used above, is one who (a) has completed thirty (30) terms of work since his last hire; (b) performs work in the payroll period in which the holiday occurs and (c) works as scheduled or assigned, both on his last schedule work day period to and on his first schedule work day following the holiday unless he has failed to so work because of sickness or because of death in the immediate family or because of similar good cause.

3. A part time employee who is otherwise eligible shall receive pay for a holiday not worked on the basis of his total hours worked in the pay period in which the holiday

is observed, divided by ten (10), times his straight time hourly rate of earnings in such pay period (excluding the overtime premium).

4. When holiday occurs during an eligible employee's scheduled vacation, he shall be paid for the unworked holiday in addition to his vacation pay.

5. Under existing arrangements, when weekly pay periods are used, the pay period for the purpose of this section shall include the weekly period in which the holiday occurs and next preceding pay period. When an employee's scheduled vacation coincides with the pay period in which the holiday occurs, the next preceding pay period work shall be [fol. 28] used for the purpose of calculating his pay for the unworked holiday.

6. If an eligible employee performs work on a holiday but works less than eight (8) hours, he shall be entitled to the benefits of this section to the extent that the number of hours worked by him on the holiday is less than eight (8).

7. Holidays, whether worked or not, shall be credited only as a single day for the purpose of computing weekly overtime under the provisions of Section 6, "Hours of Work."

8. For all hours worked by an employee on any of the Holidays specified above, overtime shall be paid at the overtime rate of:

a. Effective as of the date of this Agreement the employee shall receive two times his regular rate of pay.

b. Effective July 1, 1957, the employee shall receive two and one-tenth times his regular rate of pay.

c. Effective July 1, 1958, the employee shall receive two and one-fourth times his regular rate of pay.

Section 15.

Duration of Agreement.

All terms and conditions of this Agreement shall continue in full force and effect until midnight, September 25,

[fol. 29] 1959, and thereafter from year to year unless either party shall notify the other in writing at least sixty (60) days prior to September 25, 1959, or any anniversary thereof, of the intention of changing, modifying, or terminating this Agreement.

In Witness Whereof, The Warrior & Gulf Navigation Company, has caused these presents to be signed by its duly authorized officers and its corporate seal to be affixed hereto; and the United Steelworkers of America has caused these presents to be signed by its duly authorized officers and its seal to be affixed hereto, all on the day and year first above written.

WARRIOR & GULF NAVIGATION COMPANY,

By (S.) W. I. MCELROY,

By (S.) A. D. FULMER.

UNITED STEELWORKERS OF AMERICA, CIO-AFL,

By (S.) DAVID J. MCDONALD,

By (S.) I. W. ABEL,

By (S.) HOWARD R. HAGUE,

By (S.) R. E. FARR,

By (S.) B. F. GAGE,

By (S.) A. RODRIGUEZ,

By (S.) EUGENE WILLCUTT.

[fol. 30]

IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION

Received E. Oct. 17, 1958, C-1467, U. S. Marshal, Mobile, Ala.

Now comes the plaintiff, United Steelworkers of America, AFL-CIO, an unincorporated association, and moves this Honorable Court for a preliminary injunction against the defendant, until a further order of this Court, conformable to the prayer of the complaint filed herein, and respectfully requests this Court to fix a date for a hearing on this Motion and to order defendant to show cause on that date why such preliminary injunction should not be granted and to fix the form and extent of the notice of such hearing to be given to defendant, and for all such other and further relief as may seem to the Court right and proper.

Arthur J. Goldberg, General Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D.C.;

David E. Feller, Assoc. Gen. Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D.C.;

[fol. 31] Cooper, Mitch, Black & Crawford, By Hugo L. Black, Jr., 1329 Brown-Marx Bldg., Birmingham 3, Alabama,

Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER SETTING DATE FOR HEARING—October 16, 1958

Upon due consideration, it is hereby Ordered that plaintiff's foregoing Motion for Preliminary Injunction filed herein this date be and the same is hereby set down for hearing at 9:30 A.M. on October 30, 1958, at the United States District Court House, Mobile, Alabama.

Done this 16th day of October, 1958.

Daniel H. Thomas, United States District Judge.

U. S. District Court, Sou. Dist. Ala., Filed and Entered This The 16 day of October, 1958.

Marshal's Return (omitted in printing).

[fol. 33] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title omitted]

SUMMONS AND RETURN

To the above named Defendant: at Chickasaw, Alabama:

You are hereby summoned and required to serve upon plaintiff's attorneys:

Mr. Arthur J. Goldberg, General Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D. C.;

Mr. David E. Feller, Assoc. Gen. Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D. C.; and

Mr. Hugo Black, Jr., Attorney, and Firm, 1329 Brown-Marx Bldg., Birmingham 3, Alabama.

an answer to the complaint which is herewith served upon you, within 20 (Twenty) days after service of this sum-
[fol. 34] mons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

William J. O'Connor, Clerk of Court, Minnie Pearl Cox, Deputy Clerk.

(Seal)

[Seal of Court]

Date: October 16, 1958.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return on Service of Writ.

I hereby certify and return, that on the 17th day of October 1958, I received this summons and served it together with the complaint herein as follows: By handing a copy of each to Mr. W. I. McElroy, Vice-President of Warrior & Gulf Navigation Company at Chickasaw, Alabama on October 17th, 1958 at 11:10 A.M.

J. L. May, United States Marshal, By G. V. Manley, Jr., Deputy United States Marshal.

Marshal's Fees.
Travel $1.40.
Service 2.00.

[fol. 35]

In United States District Court

Motion to Dismiss—Filed October 27, 1958

Defendant, Warrior & Gulf Navigation Company, moves this Court to dismiss plaintiff's complaint and the rule for preliminary injunction issuing herein for the following reason:

Plaintiff's complaint fails to state a claim against defendant upon which relief can be granted.

October 25, 1958.

Samuel Lang, Kullman & Lang, 800 Whitney Building, JA 5-2351, New Orleans 12, Louisiana; and

T. K. Jackson, Jr., Armbrecht, Jackson, McConnell & DeMouy, Merchants National Bank Building, HE 3-1891, Mobile, Alabama,

Attorneys for Defendant.

Certificate of Service (omitted in printing).

[fol. 36]

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION TO DISMISS—Filed October 27, 1958

To: Arthur J. Goldberg, General Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Avenue, N.W., Washington 6, D. C.;

David E. Feller, Associate General Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Avenue, N.W., Washington 6, D. C.;

Hugo L. Black, Jr., Cooper, Mitch, Black & Crawford, Attorneys at Law, 1329 Brown-Marx Building, Birmingham 3, Alabama.

Please take notice that the undersigned will bring on for hearing the Motion to Dismiss the action herein before [fol. 37] the United States District Court for the Southern District of Alabama, Southern Division, on October 30, 1958, at 9:30 A.M. or as soon thereafter as Counsel may be heard.

October 25, 1958.

Samuel Lang, Kullman & Lang, 800 Whitney Building, JA 5-2351, New Orleans 12, Louisiana; and

T. K. Jackson, Jr., Armbrecht, Jackson, McConnell & DeMouy, Merchants National Bank Building, HE 3-1891, Mobile, Alabama,

Attorneys for Defendant.

Certificate of Service (omitted in printing).

[fol. 38] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS—Filed October 27, 1958

The complaint fails to state a claim against defendant upon which relief can be granted.

This action is grounded on a written labor agreement, a copy of which is made a part of the complaint. This

agreement specifies in the first sentence of the section providing for arbitration, Section 10, page 15 of Exhibit "A" attached to the complaint, that "matters which are strictly a function of management shall not be subject to arbitration." It is alleged that agreement prohibits, or can be construed to forbid, defendant employer's subcontracting out certain maintenance or repair work; that, therefore, the plaintiff union's protest against such subcontracting is arbitrable under that contract and defendant should be ordered to proceed to arbitration thereon.

The issue presented is not a novel one, and it has been held by all the Courts which have reviewed the subject that management's inherent and traditional right to subcontract may not be questioned (or subjected to arbitration) in the absence of an express limitation thereof set forth in the labor agreement. The following cases are in point:

[fol. 39] 1. Dairy, Bakery and Food Workers v. Grand Rapids Milk Division, Dairy Products Corporation, 1958, U. S. District Court, Western Division, Michigan, 160 F. Supp. 34, where a dairy discontinued its retail routes and turned the work over to independent contractors.

2. United Dairy Workers v. Detroit Creamery Company, Michigan, Circuit Court, Wayne County, in Chancery, No. 541,758, decided April 18, 1956; 30 Labor Cases 70, 115, 38 LRRM 2302. Here the company subcontracted its iceless refrigeration needs, thereby effecting a saving of $100,000.00 a year. The labor contract did not contain a management rights or prerogatives provision (one is found in the contract involved here), and (unlike the instant case's agreement) there was a contractual limitation on layoffs "as long as there is sufficient work to be done." Nonetheless the Court held that in the absence of a specific contract reference to subcontracting, the right to arbitrate did not exist. The Court said, "I have read the contract from beginning to end and I am unable to find any place in the contract where the Company has given up its managerial right to subcontract, nor confided to arbitrators the right to review their business judgment in abandoning a department."

3. The 5th U. S. Circuit Court of Appeals held to the same effect in Amalgamated Assn. of Street, Electric Railway and Motorcoach Employees of America v. Greyhound Corporation, 1956, 231 F. 2d 585, 57 ALR 2d 1394, where the employer obtained a declaratory judgment of its right under its contract with a union to subcontract janitorial work in a bus terminal, causing the discharge of a number [fol. 40] of employees. Expressing the view that the law on this point heavily favors management, the Court held that in the absence of an express provision in the labor agreement giving up its right to do so, a company may discontinue all or part of its operations. See, also, sustaining this principle, U. S. Steel Corporation v. Nichols, 6th Circuit, 1956, 229 F. 2d 396, cert. den., U. S. Sup. Ct., 351 U. S. 950.

4. Cf. Timken Roller Bearing Company v. NLRB, 6th Circuit, 1947, 161 F. 2d 949, and NLRB v. Adkins Transfer Company, 6th Circuit, 1955, 226 F. 2d 325, recognizing subcontracting to be an inherent management right which especially may not be taken from an employer where, as here, there is a contract provision recognizing the existence of and reserving management's rights and there is no express limitation on subcontracting in the contract.

The gravity of the attempt to force defendant to arbitration on this subcontract issue before an arbitrator who may not be a lawyer experienced in contract interpretation, or before an arbitrator without extensive business experience, is that no appeal lies anywhere from an arbitrator's findings of fact or conclusions of law—yet defendant's very right to efficient and profitable operation of its business is at stake under a contract which nowhere restricts subcontracting.

[fol. 41] Conclusion.

The complaint should be dismissed.

Respectfully submitted this 25th day of October, 1958.

Samuel Lang, Kullman & Lang, 800 Whitney Building, JA 5-2351, New Orleans 12, Louisiana; and

T. K. Jackson, Jr., Armbrecht, Jackson, McConnell & DeMouy, Merchants National Bank Building, HE 3-1891, Mobile, Alabama,
Attorneys for Defendant.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 42]

IN UNITED STATES DISTRICT COURT

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION—Filed October 27, 1958

Comes now the defendant, Warrior & Gulf Navigation Company, and opposes plaintiff's motion for preliminary injunction for the following reasons:

1. The granting of the preliminary injunction prayed for would have the effect of deciding the issues before a hearing on the merits.

2. Plaintiff's rights will not be further jeopardized pending a trial on the merits and greater injury will be inflicted upon defendant than upon plaintiff if the preliminary injunction is granted.

3. Plaintiff's petition fails to affirmatively show any need for the issuance of a preliminary injunction.

4. The object of a preliminary injunction is to maintain the status quo; the granting of a preliminary injunction herein would have the opposite effect.

Samuel Lang, Kullman & Lang, 800 Whitney Building, JA 5-2351, New Orleans 12, Louisiana; and

[fol. 43] T. K. Jackson, Jr., Armbrecht, Jackson, McConnell & DeMouy, Merchants National Bank Building, HE 3-1891, Mobile, Alabama,
Attorneys for Defendant.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 44]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 27, 1958

First Defense.

Defendant admits the allegations of Paragraphs I and II of the complaint, except the allegation that it has violated the contract, which is denied; defendant admits the presentation of a grievance and its refusal to have it arbitrated, but otherwise denies the allegations of Paragraph III; defendant denies the allegations of Paragraphs IV and V; Paragraph VI of the complaint requires no answer.

Second Defense.

Defendant has over a period of years pursued in the regular course of business the practice of subcontracting work of the type involved in this complaint with reference to subcontracting, without any grievances, demand for redress, or request for arbitration.

Third Defense.

Questions regarding and objections to this practice of subcontracting such work were raised during negotiation of this labor contract; plaintiff, therefore, is presently seeking to force arbitration to try by that means to have the contract "judicially" amended to give it a benefit which it voluntarily gave up for other benefits in collective bargaining negotiations.

[fol. 45]

Fourth Defense.

Plaintiff seeks to compel the employment, in work traditionally subcontracted out by defendant, of employees hired for construction work which is no longer available, and which for a long period of time has not been available.

Wherefore, the defendant prays that this answer may be deemed good and sufficient and plaintiff's suit dismissed at its cost.

Samuel Lang; Kullman & Lang, 800 Whitney Building, JA 5-2351, New Orleans 12, Louisiana; and

T. K. Jackson, Jr., Armbrecht, Jackson, McConnell & DeMouy, Merchants National Bank Building, HE 3-1891, Mobile, Alabama,

Attorneys for Defendant.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 46]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO STRIKE CERTAIN DEFENSES OF ANSWER AND ORDER OF SUBMISSION—October 30, 1958

This cause comes on to be heard in open Court on the Plaintiff's motion for a preliminary injunction, the Defendant's opposition to the Plaintiff's motion for a preliminary injunction and by agreement of counsel comes on further to be heard on the petition for a final injunction.

Now comes the Plaintiff by its Attorneys and orally move the Court to strike the Second, Third and Fourth Defenses of the Defendant's answer. Arguments are heard and after consideration thereof,

It Is Ordered by the Court that the Plaintiff's oral motion to strike the Second, Third and Fourth Defenses of the Defendant's answer be, and the same hereby is, Denied.

[fol. 47] Witness are examined, exhibits offered in evidence and the Plaintiff rests.

Witnesses are further examined and the Defendant rests.

Witnesses are further examined and the Plaintiff rests.

Thereupon, this cause is hereby submitted without argument.

It Is, Therefore, Ordered by the Court that this cause be, and the same hereby is, taken under Submission.

Made at Mobile, Alabama, this the 30th day of October A. D. 1958.

Daniel H. Thomas, United States District Judge.

[File endorsement omitted]

[fol. 48]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS Had Before Hon. Daniel H. Thomas, U. S. District Judge, at Mobile, Alabama, on October 30, 1958.

[Title omitted]

APPEARANCES:

For Plaintiff—Hugo Black, Jr., Esq.

For Defendant—Samuel Lang, Esq., and T. K. Jackson, Jr., Esq.

Judge Thomas: Civil Action No. 2100, United Steelworkers of America AFL-CIO, vs. Warrior & Gulf Navigation Company, what says the Plaintiff?

Mr. Jackson: May it please the Court, may I present at this time to the Court Mr. Samuel Lang of New Orleans, Louisiana. He is a member of the bar of the Supreme Court of the State of Louisiana and he has been admitted to practice before the United States Circuit Court of Appeals for the Fifth Circuit and the United States District Court for the Eastern District of Louisiana.

Judge Thomas: We are glad to have you, Mr. Lang. You are associated with him in this case?

Mr. Jackson: Yes, sir.

Judge Thomas: What says the Plaintiff?

COLLOQUY RE: MOTION TO DISMISS, MOTION TO STRIKE PARTS OF ANSWER AND ORDER DENYING MOTION TO STRIKE

[fol. 49] Mr. Black: Your Honor please, the Plaintiff is ready. I want to state this, if Your Honor please. On Monday of this week, I was in Tampa, Florida, trying a case, and Mr. Lang was kind enough to send some motions to my office on that date. My office forwarded that information to the Battle House. I received it yesterday when I came in. Consequently, I have had no time to

prepare certain responsive pleadings to the answer. There are three paragraphs I would move to strike. However, the Plaintiff is ready to try the case, if it is all right with the Defendant, if they have their witnesses today. I would as soon try the whole thing today and get rid of it rather than have it tried twice.

Judge Thomas: It comes up today on a preliminary injunction.

Mr. Black: Yes, sir. The evidence would be largely the same as for a permanent injunction.

Judge Thomas: What says the Defendant?

Mr. Lang: We are ready. We have filed a motion to dismiss, with a memorandum of authorities to support that motion. Of course, it is part and parcel of the same. We would prefer also to dispose of it today at one time, if possible, but we think the law question is so important that we would like to take that up first. We feel that the Court may feel, after hearing the arguments on the law, [fol. 50] that it is unnecessary to go into the evidence.

Mr. Black: I presume by that you want to take up the motion to dismiss first?

Mr. Lang: Yes, sir.

Mr. Black: That is perfectly all right with us.

Judge Thomas: It seems to me that the proper procedure is to take up the motion to dismiss. If that is granted, that ends it. If not, we will go into it. Both of you gentlemen want to hear it on both the preliminary injunction and permanent injunction. We have the Court reporter here.

Mr. Lang: If the motion to dismiss is not granted, we would like to suggest perhaps that the merits can be handled by affidavit.

Mr. Black: I would prefer to cross examine. I have my witnesses here live. Mr. Lang has his, too.

Mr. Lang: We are prepared to go into it by oral testimony.

[fol. 51] Mr. Black: I have not had an opportunity to file a little memorandum like Mr. Lang has, on the motion to dismiss, but I presume he has the right to open and close on that, since he is making the motion.

Judge Thomas: I note you have filed an answer, Mr. Lang, but we will go into the motion to dismiss first. You may proceed.

Mr. Black: When it comes time to deal with the answer, I would like to have leave to file an oral motion to strike. When I can get hold of my secretary, it will be put in writing.

Thereupon, counsel argued the motion to dismiss.

Judge Thomas: I reserve my ruling on this motion to dismiss, and I will hear the case on its merits.

Mr. Black: I would like at this time to file an oral motion to strike.

The Plaintiff moves to strike the second, third and fourth defenses set up in the answer, and as grounds therefor, says as follows:

1. Said defenses do not constitute defenses to the issue before the Court, namely, the issue of whether or not the grievance mentioned in the complaint should be arbitrated, but go to the merits of the grievance.

[fol. 52] 2. It is not for this Court to try out any defenses which the company might have to the grievance, which is made the basis of the complaint herein.

Respectfully submitted, Cooper, Mitch, Black and Crawford, By Hugo L. Black, Jr.

Mr. Black: If Your Honor please, I think the motion is well taken, and if Your Honor has any doubts about it, I would like to speak about a minute on it.

Judge Thomas: Motion denied. Go ahead.

Mr. Black: Exception.

Judge Thomas: Does either side ask for the rule?

Mr. Lang: Not on our part.

Judge Thomas: Do you, Mr. Black?

Mr. Black: No, sir.

Judge Thomas: All witnesses in this case come in and be sworn, please.

[fol. 53] Thereupon, the witnesses were duly sworn by Mr. T. T. Shepard, Chief Deputy United States Clerk.

Judge Thomas: Have seats back out there, please. You will be called.

Mr. Black: I want to point out to Your Honor that Paragraph 1 of the complaint, except that they breached the contract, is admitted by the answer. Paragraph 2 of the complaint, that is the execution of the contract, is admitted by the answer, and that the filing of the grievance alleged in Paragraph 3 is admitted, and it is admitted that the Plaintiff has duly requested the Defendant to arbitrate the grievance, and that the Defendant has failed to arbitrate the grievance. In Paragraph 3, as I see it, the only thing left in that paragraph is to prove that the company has been contracting out maintenance work and that maintenance work was under the contract when the contract was signed.

Judge Thomas: Mr. Lang, are you in accord, in that, the pleadings admit Paragraph 1 of the complaint, with the exception mentioned, admit Paragraph 2, and you admit that the grievance was filed?

Mr. Lang: I think that is all we have admitted, sir.

Mr. Black: You don't deny that you all refused to arbitrate?

[fol. 54] Judge Thomas: That is a conclusion that the arbitration was refused. I think that pretty well catalogues what we are in agreement on and what we are in disagreement on.

Mr. Black: I think it does.

WILLIE E. ESTES, being first sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Black:

Q. What is your name, please?
A. Willie E. Estes.
Q. Where do you live, please, sir?
A. Wilmer, Route 6, Box 67.
Q. Were you ever employed by the Warrior & Gulf Navigation Company?

A. Yes, sir.

Q. How long were you employed by them?

A. Approximately eight years.

Q. What job did you have at the Warrior & Gulf Navigation Company?

A. At the Chickasaw plant and terminal, sir, welding, burning, ship fitting, pipe fitting.

Q. Anything else?

A. Plumbing a little.

Q. What was your classification?

A. Welder.

Q. Did you have a title, were you a mechanic?

[fol. 55] A. General mechanic.

Q. All right, sir. Now, did you ever work on barges?

A. Yes, sir.

Q. Owned by the company, while you were there?

A. Yes, sir.

Q. What kind of work did you do on those barges?

A. Welding, burning, ship fitting.

Q. Who laid that work out for you?

A. The foreman.

Q. Which foreman laid that work out for you?

A. At that time, Mr. Albert Jones.

Q. Was all this going on when the last contract with the Union was signed on September 25th, 1956?

A. Yes.

Q. Are you presently working for Warrior & Gulf Navigation Company?

A. No.

Q. When did you last work for them?

A. I believe that was in January of 1957.

Q. January of 1957?

A. Yes, that was the last employment, I believe.

Judge Thomas: Almost two years ago?

A. Yes, sir.

Mr. Black: Mr. Estes, before you left the Warrior & Gulf Navigation Company, did anything happen with reference to the work that you had been doing on the barges there?

[fol. 56] A. Anything happen?

Q. Yes, sir, what about the volume of the work on the barges, what happened to it?

A. Well, it was left there, that is all I know.

Q. After you were laid off, did you go to work for another concern?

A. Yes, sir.

Q. Where?

A. Harrison Brothers Dry Dock, at Blakely Island.

Q. How long have you worked for Harrison Brothers Dry Dock at Blakely Island?

A. Nearly two years, sir, from the time I got laid off out there up until now.

Q. What type of work have you been doing for Harrison Brothers?

A. Welding, burning, ship fitting, pipe fitting.

Q. Have you been doing any work on Warrior & Gulf barges?

A. I have.

Q. What type of work have you been doing on Warrior & Gulf barges?

A. Burning, welding, ship fitting.

Q. Is that the same type of work and the same work that you were doing on the same barges that you worked on at Warrior & Gulf Navigation Company?

A. Yes, sir.

Q. Who lays out the work for you? Did Mr. Jones ever lay it out for you at Harrison Brothers?

A. Mr. Jones comes down there and Mr. Martin comes down there.

Q. Whose employee is Mr. Jones?

A. The Warrior & Gulf's.

[fol. 57] Q. Is that the same Mr. Jones who laid your work out for you at Warrior & Gulf, when you worked there?

A. That is right.

Q. Now, Mr. Jones, who is still an employee of Warrior & Gulf Navigation Company, comes down to Harrison Brothers and lays out your work for you there?

A. He shows the boss down there what he wants done.

Q. You said another man came down there. Who is that?

A. Mr. Martin usually comes, but Mr. Jones comes, too.

Q. Who is Mr. Martin?

A. Well, he is an employee of Warrior & Gulf Navigation Company.

Judge Thomas: In what capacity?

A. I don't know, sir.

Mr. Black: What did Mr. Martin do for Warrior & Gulf Navigation Company, when you were out there?

A. I don't know.

Q. (Mr. Black continuing): What does Mr. Martin do, when he comes down to Harrison Brothers?

A. He just shows what he wants done on the barges.

Q. What does he do? How does he show what he wants done?

[fol. 58] A. He carries our boss now where I am employed around and shows him what he wants done and he marks it up.

Q. How does he mark it?

A. Mr. Martin and our boss, and Mr. Albert Jones, when he comes down there, mark it with yellow crayon.

Q. Just as he did when you worked for Warrior & Gulf Navigation Company?

A. That is right.

Q. Down at Harrison Brothers, do you work under a Union contract?

A. No, sir.

Q. Do you get vacation pay down at Harrison Brothers?

A. No, sir.

Q. Did you get vacation pay under the union contract at Warrior & Gulf Navigation Company?

A. I did.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Thomas: Does that have anything to do with the merits of this case? Isn't that window dressing?

Mr. Black: No, sir. I understood, when I moved to strike the portions of the answer that I moved to strike,

that you wanted to go into the merits of the grievance. The arbitrators have considered relevant the wages that he was getting at the new place, where his old boss came down directing the work—it was an attempt by the compan—

[fol. 59] Judge Thomas: Is not the whole question in this case whether they are required to arbitrate or not?

Mr. Black: That was my conception, but not the conception of Mr. Lang. That is the reason why I was going into this.

Judge Thomas: Mr. Lang, is not the question: Are they required to arbitrate or not?

Mr. Lang: Yes, sir. In answer to counsel's reference to the defense subsidiary to the basic question or to other questions such as that, Your Honor noted that this witness was laid off almost two years ago, this is a matter of estoppel and a matter of continuous practice not objected to and a matter of fact that this union itself has by inference and by much the same manner bargained away its right to the subcontracting and of initiating any protest during a period when a new contract was sought for this very thing and then yielding to the company's refusal to include such portion. Those are legal defenses to the question of arbitrability.

Mr. Black: I want to point out again the point I was trying to make. Apparently, I may not have made it clear enough. What he is saying is what he wants to do. He wants to present to Your Honor the defenses he would have before an arbitrator. We would like to admit the question of arbitrability. He is trying to get Your Honor to rule on the merits of this case—

[fol. 60] Judge Thomas: The sole question in this case is: Are they required to arbitrate under the terms of the contract or are they not. That is the issue in this case.

Mr. Black: For my own clarification and conduct, if Your Honor please, in putting on testimony, does Your Honor have as broad a conception of what the word "arbitrability" embraces as my good friend, Mr. Lang, who just, in effect, said that arbitrability means that Your Honor should decide the merits of the grievance?

Judge Thomas: I will state it again. The sole question in this case is: Are they required to arbitrate under Paragraph 10 or not? That is as plain as I know how to put it.

Mr. Black: On Your Honor's earlier statement that's what I was saying was window dressing, I will put two and two together and will turn this witness over to Mr. Lang.

Judge Thomas: It is a question of what work the gentleman did up there. Mr. Estes, I want to ask you this: You were laid off, were you not?

A. Yes, sir.

Judge Thomas: At Warrior & Gulf Navigation Company?

A. Yes, sir.

[fol. 61] Judge Thomas: Why were you laid off?

A. I don't know, sir. He didn't say.

Judge Thomas: But you are doing the same work at Harrison Brothers that you did do up there?

A. Yes, sir.

Cross examination.

By Mr. Lang:

Q. Mr. Estes, did you file a grievance with the Warrior & Gulf Navigation Company, after you were laid off in January 1957?

A. Did I file one?

Q. Yes, sir? Did you or your union, on your behalf, file a grievance with the Warrior & Gulf Navigation Company at the time you were laid off in January 1957, protesting your lay off?

A. Well, I don't know, sir, if they were filed.

Mr. Black: We will stipulate he filed no such grievance. The grievance with which we are concerned here is the one mentioned in the complaint filed on August 22nd, 1958.

Judge Thomas: It is stipulated that he filed no grievance.

Mr. Lang: May we also stipulate that there have been no lay offs since early January 1957?

[fol. 62] Mr. Black: If Your Honor please, I think that is correct.

Judge Thomas: I think it should further be stipulated how many were laid off.

Mr. Black: At the time the contract was signed, there were one hundred and two mechanics and helpers employed at the Chickasaw Terminal. There are now twenty-one.

Mr. Lang: Those are not the facts. The facts are and I think we ought to state them fully that there was a period of new construction, prior to which this company had approximately the same number of employees as today. It has had in this work, during the period of construction, which extended over a period of ten years immediately following World War II, fluctuations in the number of employees.

Mr. Black: I don't think that has a thing in the world to do with your question.

Mr. Lang: I am getting to the number of employees. At the time the contract was signed, there were sixty employees.

Mr. Black: And immediately earlier there were one hundred and two.

[fol. 63] Mr. Lang: At the time the contract was signed, there were twenty-eight mechanics and thirty-two helpers. That number was reduced, as it had been in the process of being reduced. The process of reduction had been going on for some time prior to the execution of the contract, and the completion of the reduction was very shortly after this contract was signed, at the end of 1956, and the final two or three were laid off in early January 1957, and there has been no reduction since then.

Mr. Black: All we will agree to about those things he has stated is that the last lay offs were in January 1957. I don't think it is relevant, but we will stipulate that, to save time.

Mr. Lang: During the eight years of your employment with the company, with Warrior & Gulf Navigation Company, you knew that the company subcontracted its work

out, a considerable portion of its work out, just as it did after your lay off, did you not?

A. There was some, yes, sir.

Q. (Mr. Lang continuing): You know there was the continuous practice of having various ship repair yards in this area do repair and construction work on the equipment?

Mr. Black: We are not complaining of any construction work. They can build the ships anywhere they want to. They are not covered by our contract.

[fol. 64] Judge Thomas: Limit it to repair.

Mr. Lang: During the entire time you worked for Warrior & Gulf Navigation Company, that company continuously had repair work done on its equipment at various ship repair yards in this area?

Mr. Black: Objection. I don't see what that has to do with this particular issue.

Judge Thomas: Overruled.

Mr. Black: Exception.

A. Yes, sir, they did that. Some of the barges we could not handle. They were loaded. They would have to go to dry dock.

Judge Thomas: Mr. Black, if you have other witnesses who are cumulative to Mr. Estes' testimony, could not that be stipulated?

Mr. Black: We have one more who works at Bender's, who will testify to the same thing, and we have—

Mr. Lang: If you will tell me what you seek to prove by this witness I might stipulate that if this witness were [fol. 65] placed on the stand, the witness might so testify, and waive cross examination.

Mr. Black: Mr. Eugene Wilcutt will testify that he worked on Warrior & Gulf Navigation Company barges which were the same barges he had worked on at Warrior & Gulf, while he was working for Bender, and that he did the same type of work at Bender on those barges which he had done at Warrior & Gulf, that he was laid off from the Warrior & Gulf Navigation Company in October 1956, that he worked at the Bender Company and the work was

laid out him by the same foreman who laid out the work fo[illegible] when he was employed at Warrior & Gulf Navigat[illegible]ompany.

Judge Thomas: All right, is that stipulated?

Mr. Lang: I don't know whether the words used by counsel were "laid off by a lack of work". Moreover, the contract is dated—

Judge Thomas: All I am trying to do is to shorten the proceeding. If not, call the witness.

Mr. Lang: The substance of that I would stipulate to. I don't know whether the language used was that to which I referred. I do stipulate that this reduction occurred.

[fol. 66] Mr. Black: I will put it this way. He ceased going to Warrior & Gulf Navigation Company on the aforementioned date and working at said place and obtaining wages therefor, and has not gone to said place and worked for wages since said date.

Mr. Lang: The date, however, appearing on the contract of September 26th is not the date of the execution of the contract in evidence. As I understand, that contract was actually signed November 3rd, 1956.

Mr. Black: The contract on its face says September 26th, 1956. That is the date when it became effective. That is the only relevant date, so far as Your Honor is concerned.

Mr. Lang: I would join in that stipulation with the provision this witness would likewise testify that he has not at any time, at least, prior to August 22nd, participated in any grievance or complaint about his being laid off.

Judge Thomas: That is agreeable, is it not, that he filed no grievance?

Mr. Black: Not at the time he was laid off. He understood he was laid off for lack of work.

[fol. 67] Judge Thomas: He participated in this grievance?

Mr. Black: Yes, sir, he was there at the hearing on this grievance.

Judge Thomas: All right, go ahead.

ROBERT G. LISTER, being first sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Black:

Q. What is your name, please?
A. Robert G. Lister.
Q. Mr. Lister, where are you employed now?
A. Warrior & Gulf Navigation Company.
Q. How long have you been so employed, sir?
A. Right close to twelve years.
Q. What is your job out there?
A. Mechanic.
Q. As a mechanic, what kind of jobs do you do?
A. Burn, weld, ship fit, work on Diesel engines, pipe fit.
Q. Now, do you recall around September 25th, 1956, do you recall the nature of the work that the company had there in the yard around that date?
A. Yes, sir.
[fol. 68] Q. All right, sir, included among the things that you worked on, were you working on barges at that time?
A. Yes, sir.
Q. What kind of work did you do on barges?
A. Well, if a barge had come in and had a hole in it, we patched it, and, if it were necessary to renew a plate, we renewed it. On one occasion, a barge got damaged in a wreck, and we fixed it altogether, we made a new front end for it and put it on there.
Q. Now, at that time and at the present does the company have facilities for turning over barges?
A. Well, they are working on facilities to turn the barges, but it is not complete.
Q. Now, when you say "turn the barges" what do you mean?
A. Well, I mean, that is, to turn it over, where the bottom, which is ordinarily in water, will be on the top, where you can work on it.
Q. What do you do with the bottom?
A. Take it off and put a new one on.

Q. Has that kind of work been going on at the terminal out there?

A. No, sir, we have not done any of that. I don't remember just exactly when the last one was, but it must have been in 1951 or 1950 since we turned a barge.

Q. Do you still do some work on barges out there?

A. Yes, sir.

Q. Have you done any work on barges in the last couple of months?

A. Yes, sir.

Q. What kind of work have you done?

A. Little repair jobs like holes, maybe rust in them, maybe something like that.

[fol. 69] Q. That kind of work that you have been doing and do this day, is a lot of that also being contracted out by the company?

A. Yes, sir.

Q. To what firms?

A. Bender, Harrison and Mobile Ship Repair, Jackson and Hope.

Q. When you do work on barges like that, who lays that work out for you?

A. Well, see, we have two or three different leadermen out there or foremen and it is whichever one we are working under.

Q. Is one Albert Jones?

A. Yes, sir.

Q. Do you know who goes down to Harrison Brothers to lay out the work for men to do on Warrior & Gulf Navigation Company barges there?

A. Well, it is one of the supervisors in the division whichever one the company see fit to send, either Mr. Jones or Mr. Few or Mr. Johnny Williams.

Q. Now, I will ask you if you know how many supervisors the company had employed around September 25th 1956?

A. How many supervisors?

Q. How many supervisors and foremen?

A. There is Mr. Williams, Mr. Albert Jones, Mr. Walter Few.

Q. Let me ask you this. Have any of the foremen who

were working there at that time been laid off or left since that time?

A. No, sir.

Q. At that time, they were supervising sixty men. At the present time, how many?

A. Six mechanics and twelve or thirteen helpers.

[fol. 70] Q. But you still have the same number of supervisors?

A. Yes, sir.

Q. Has the clerical force been reduced since that date, since September 25th, 1936?

A. I don't know just what you mean.

Q. Have any of the clerks been laid off or are there less than there used to be?

A. Not that I know.

Q. The only employees affected by this contracting out have been the mechanics and the helpers, that right?

A. That is right. May I ask a question?

Judge Thomas: Mr. Black, the witness wants to ask a question.

Witness: I would like to know why we could not continuously do the work out there the same as we send it off to Bender or some of the rest of them.

Mr. Black: We will get down to that.

Q. (Mr. Black continuing): Now, Mr. Lister, are you familiar with the meeting which we had, concerning the grievance which we are suing on here today?

A. Yes, sir.

Q. At that meeting, did you tell Mr. McElroy about some work that had been done by the employees of an independent contractor?

[fol. 71] Mr. Lang: Objection, as incompetent.

Mr. Black: We are going to show that Mr. McElroy stated there were certain kinds of work the company could not contract out.

Judge Thomas: Who is Mr. McElroy?

Mr. Black: Vice President of the Warrior & Gulf Navigation Company.

Judge Thomas: I don't think that is admissible. Sustained.

Mr. Black: Exception.

Mr. Black: Your Honor—

Judge Thomas: What is it you expect to prove?

Mr. Black: We expect to show that as a result of what he said to Mr. McElroy, Mr. McElroy admitted there were many types of work that the company felt they could not contract out. Here they are claiming we cannot arbitrate the question. He is Vice President of the Warrior & Gulf Navigation Company, which is the Defendant in this case.

[fol. 72] Judge Thomas: O. K. Go ahead.

Mr. Lang: Exception.

Mr. Black: Who is Mr. McElroy?

A. Vice President of the Warrior & Gulf Navigation Company.

Q. (Mr. Black continuing): At the meeting we are talking about, did Mr. McElroy speak for the company?

A. Yes, sir.

Q. Would you tell the Judge what you said to Mr. McElroy about some work that had been contracted out at that particular time?

A. Now, I have said so much to Mr. McElroy I would have to know what meeting you are referring to.

Q. I direct your attention to the meeting I attended and to the subject of screws for the foundation. You said among other things—

A. Oh, that was pertaining to the petition we carried to the company for arbitration on this case?

Q. That is correct. Yes, sir, go ahead?

A. It is so much.

Q. That is all right.

A. I cannot remember all of it.

Q. All right, sir. We wil bring that out by another witness then. Mr. Lister, could you tell us how many hours of work, on the average, mechanics have been doing out there at the company, in the past couple of months?

[fol. 73] A. I have been on ten hours a day for the past six weeks.

Q. All six mechanics have been on ten hours a day for the past six weeks?

A. Well, no, there have been some days that all six could not work, because of a hold up in the machine shop.

The machine shop did not get the material out for us to continue.

Q. On the average, have all six been working ten hours a day?

A. On the average, yes, sir.

Q. On the average day, the six could do over eight hours work, is that right?

A. That is right.

Q. Do you know who is next on the company's recall list, seniority recall list?

A. J. L. Daugherty.

Q. Was Mr. J. L. Daugherty an official of the union?

A. Yes, sir, shop steward.

Q. Was he a militant union man?

Mr. Lang: Objection.

Judge Thomas: Sustained.

Mr. Black: Exception.

Mr. Black: We were going to offer to show that only for the purpose of showing this: we are contending when the case is arbitrated, one reason the company has con-
[fol. 74] tracted out this work is to avoid calling Mr. Daugherty back.

Judge Thomas: Didn't you say you were not going into the arbitration?

Mr. Black: Yes, sir.

Cross examination.

Mr. Lang:

Q. You are President of the Union, are you not?

A. Yes, sir.

Q. Do you know what the company's supervisors do when they visit the repair shops to which this work is contracted out?

A. No, sir, I don't know exactly.

Q. You have no first hand knowledge of it?

A. No, sir.

Q. You don't know whether they inspect or whether they carry plans or just what they do over there?

A. No, sir.

Q. During the entire period of twelve years that you have worked for Warrior & Gulf Navigation Company, have you not observed that there has been a continuous practice of subcontracting repair work to outside shops?

A. There has been some, yes.

Q. Continuously throughout those twelve years?

A. Yes, sir.

Q. Do you have any way of knowing how much it has been at various stages?

A. No, sir, I sure would not.

[fol. 75] Q. Do you have any way of knowing whether or not the company has saved money by doing that?

A. No, sir.

Q. Do you have any way of knowing what enters in the judgment in determining whether to subcontract this work or not?

A. No, sir, I sure would not.

Q. Do you have any knowledge to indicate that the company has subcontracted this work out over the years for any reason other than the purpose of efficiency and economy?

A. No, sir.

Judge Thomas: Mr. Lister, I don't know whether you are able to answer this question or not. The work which is now being presently contracted out, were you all equipped to do that work out there at Warrior & Gulf Navigation Company?

A. Yes, sir.

Mr. Lang: One more question: You participated in negotiations on behalf of the Union, when the contracts with this company were negotiated, did you not?

A. Only on the first one.

Q. (Mr. Lang cont.): That was in 1952?

A. 1952, yes, sir.

Q. You were not in the negotiations the last time, in 1956?

A. No, sir.

Q. During the negotiations in 1952, was there not brought up by the Union the subject of limitation of the company's right to subcontract this work out?

[fol. 76] Mr. Black: Objection.

Judge Thomas: This is the 1952 contract?

Mr. Black: Yes, sir.

Judge Thomas: Sustained.

Mr. Lang: Exception.

Judge Thomas: I want to ask this gentleman two questions. Is Mr. Estes on the recall list?

A. Yes, sir.

Judge Thomas: Do you know where?

A. I believe he is the fourth down. I may be wrong.

Judge Thomas: Is Mr. Willcutt on it?

A. If his two years have not expired. I don't know just when he was laid off. He was laid off in 1956, I believe.

Judge Thomas: After they have been gone two years, are they taken off the recall list?

A. Yes, sir.

[fol. 77] Mr. Lang: Mr. Lister, if more than one barge is in need of repair, can it be handled at the yard?

A. Providing that it does not have to go on the dry dock.

Q. (Mr. Lang continuing): If more than one barge is leaking, it cannot be handled at the yard?

A. If you have to dry dock it, to fix the hull.

Q. In other words, the facilities at the yard are quite limited?

A. Yes, sir.

Judge Thomas: How many docks do you have?

A. Just one.

Judge Thomas: Can you handle more than one barge at the time?

A. No, sir.

Mr. Lang: Do you know how many barges the Warrior & Gulf Navigation Company operates?

A. No, sir.

Q. (Mr. Lang continuing): Do you know it is over one hundred?

A. I feel like it is, but I could not say it was or was not, because I don't know.

Q. Can you dock a loaded barge at the Warrior & Gulf Navigation Company?

A. That depends on how much tonnage the barge has in it.

[fol. 78] Re-direct examination.

By Mr. Black:

Q. Mr. Lister, does this grievance concern the contracting out of any work that the company cannot handle at its terminal facilities there? Are we claiming that they cannot contract out work that they cannot do at the terminal?

A. No.

Q. Are we claiming that they cannot send a barge in need of emergency repairs to another place when we are working at the place there?

A. No, sir.

Q. Have we ever complained that they could not contract out work in an emergency or work that we could not do?

A. We never have.

Chaille E. Ward, being first sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Black:

Q. What is your name, please?

A. Chaille E. Ward.

Q. Where do you live?

A. Citronelle, Alabama.

Q. Were you ever employed by the Warrior & Gulf Navigation Company?

A. Yes, sir.

Q. Whereabouts were you employed by them?

A. At the Chickasaw Terminal.

[fol. 79] Q. What did you do, when you worked for them?

A. Well, I was a mechanic.

Q. As a mechanic, what kind of jobs did you do?

A. Well, I did burning, welding, pipe fitting, carpenter work.

Q. How long did you work for them?

A. From the second day of November, 1948 up until January 1957.

Q. What happened in January 1957?

A. I was terminated.

Q. Laid off or terminated, in any event, you ceased to work there, is that correct?

A. Yes, sir.

Q. Are you still on lay off from the company?

A. Yes, sir.

Q. Have you ever gone back to work for the company since that date?

A. No, sir.

Q. You have signed a grievance which is the basis of this law suit, have you not?

A. Yes, sir.

Q. Have you ever worked for Harrison Brothers?

A. Harrison Brothers Dry Dock?

Q. Yes?

A. Yes, sir.

Q. When did you work for Harrison Brothers Dry Dock, to the best of your recollection?

A. October, November and December 1957.

Q. What did you do at Harrison Brothers Dry Dock?

A. Well, I was a burner, a welder, sir.

Q. Did you work on Warrior & Gulf Navigation Company equipment?

A. Yes, sir.

Q. What kind of equipment did you work on?

[fol. 80] A. On the barges, on the older barges, they removed the wooden hatch covers and replaced them with metal covers.

Q. When you worked for Warrior & Gulf Navigation Company, did you do the same kind of work on the same kind of barges for them?

A. Yes, sir.

Q. When you worked for Warrior and Gulf Navigation Company, did you have anything to do with the installation of some facilities which were placed there, for the purpose of turning over barges, and, if so, tell us what you had to do with those facilities?

A. Well, the only actual part I had to do with it was the location of an electric winch which they used for power for turning the barges over.

Q. Have any barges, to your own knowledge, been turned over out there at the terminal?

A. Yes, sir.

Q. Where was that done? Was it done at a different place, or was it done out there at the terminal?

A. At the terminal.

Q. This winch that you installed, was anything else done there to the harbor, to ready the harbor for the turning over of barges?

A. Yes, when we put that winch out there, Mr. Nichols—

Q. Who is Mr. Nichols?

A. Another foreman out there. He come out there and showed me how he wanted and where he wanted everything, and we had to dig out and make a foundation, and he told me it was their intention to turn over barges over there; outside of that, there was some other work that went on, sir, out there, which was in connection with that, they were going to dredge a slip out to make it deeper, and they also drove two clusters of piling on the far side [fol. 81] of the slip, they called them dead men, for anchoring cables to, to turn the barges.

Q. What was the purpose of turning the barges?

A. To put new bottoms on.

Q. Have you put new bottoms on at Harrison Brothers?

A. No.

Q. Do you know whether Harrison Brothers have ever put new bottoms on them for Warrior & Gulf Navigation Company?

A. No, sir.

Cross examination.

By Mr. Lang:

Q. You filed no grievance after your lay off in January 1957, until the grievance was filed in this case on August 22nd, 1958, is that correct?

A. That was when the actual grievance was signed by me.

Mr. Lang: May I say something that may save some time? We are not contending here, as our answer clearly shows, that we have not done work at the Warrior & Gulf Navigation Company terminal, much of the same character, a great deal of the same kind of work that is being done in these yards where the work has always been subcontracted, just as it is now. In fact, as we will show, when we put on our case, we have engaged in major ship construction in that yard. The question is whether we can do some of the work which we are subcontracting out, or that some of these men can do some of the work which [fol. 82] we are subcontracting out. That is not the question, as we see it. We are not contending that some of the work which we are subcontracting out cannot be done on our yard. If we can save some time in the presentation of counsel's case, we will be glad to stipulate that.

Mr. Black: I am not interested in any stipulation, particularly, the first part of what he has had to say. We want to show this company is contracting out the very work we made this contract about, and some of the very employees that did the work on this contract are at these other places doing the same work for less wages.

Judge Thomas: Go ahead. If we had had a pre-trial of this case, I would have cut it in one-fourth.

Mr. Black: I wish you had.

Judge Thomas: I wish I had, too, but I was not requested to. I didn't know what was in it.

[fol. 83] A. Gus Rodriguez, being first sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Black:

Q. What is your name, please?
A. A. Gus Rodriguez.
Q. Where do you live?
A. Chickasaw.
Q. What is your job?
A. Staff representative United Steelworkers of America.
Q. In your capacity, as staff representative of United Steelworkers of America, do you deal with the Warrior & Gulf Navigation Company?
A. I do.
Q. Did you handle the grievances which are the basis of this law suit?
A. I did.
Q. Do you have those grievances with you?
A. Yes.
Q. Do those grievances also show the employees who are parties to the grievances?
A. Yes, sir.
Q. Do you have them with you, sir?
A. They are in my brief case over there.
Q. Is this document I am showing you one of these grievances?
A. Yes, sir.

Mr. Black: I would like to offer this grievance report, as Plaintiff Exhibit 1.

[fol. 84] Thereupon, said grievance report was marked Plaintiff Exhibit 1.

Mr. Black: Mr. Rodriguez, do you have the other grievance, which is the subject of this law suit?

A. Yes, sir.
Q. (Mr. Black continuing): I show you a paper, and

I ask you is this the other grievance to which you refer, concerning the subject of contracting out?

A. Yes, sir.

Mr. Black: I would like to offer this grievance report as Plaintiff Exhibit 2.

Thereupon, said grievance report was marked for identification Plaintiff Exhibit 2.

Mr. Lang: May I have a moment, sir, on this?

Judge Thomas: Surely.

Mr. Lang: We object to this document on the ground that it is beyond the scope of the pleadings. The only grievance involved here is the one set forth in Paragraph 3, the grievance filed on August 22nd, 1958.

[fol. 85] Mr. Black: We would like to amend the complaint to put the letter "s" wherever the word "grievance" appears.

Judge Thomas: How many are there?

Mr. Black: Two, filed on the same date and discussed on the same.

Mr. Lang: I don't agree. That grievance bears the date of September 3rd, 1958.

Mr. Black: They were both discussed on the same date.

Mr. Lang: No, unless it was subsequent to or on September 3rd, 1958. The previous grievance was August 22nd, 1958.

Mr. Black: You were not there.

Mr. Lang: They could have been discussed subsequent to August 22nd, 1958, but this one dated September 3rd, 1958, could not have been discussed on August 22nd, 1958, when the first grievance was presented. This relates to something beyond the scope of all the pleadings herein.

[fol. 86] Judge Thomas: Let me see it, please.

Mr. Lang: Yes, sir.

Mr. Black: If Mr. Lang has any doubts about it, he can ask Mr. Rodriguez a couple of questions.

Judge Thomas: Objection sustained. This is matter outside the scope of the pleadings.

Mr. Black: Exception.

Mr. Black: Mr. Rodriguez, subsequent to the date on which you filed the grievance, which is in question here,

did you write the company a letter and add some other parties to the grievance?

A. Yes, sir.

Q. (Mr. Black continuing): Do you have a copy of that document with you?

A. I think you have it.

Q. Is this the letter?

A. Yes, sir.

Mr. Black: I would like to offer this letter dated October 9th, 1958 as Plaintiff Exhibit 3.

[fol. 87] Thereupon, said letter was marked Plaintiff Exhibit 3.

Cross examination.

By Mr. Lang:

Q. Mr. Rodriguez, referring to Plaintiff Exhibits 1 and 3, would you please point out the names of those persons who still have seniority, that is, within the two years, and who are laid off?

A. The signers of the Exhibit were present at the meeting when this grievance was instituted and they all claimed that they had been laid off within the two years period.

Mr. Black: Whatever the company's record shows on that, we will stipulate is correct.

Mr. Lang: All right.

Judge Thomas: Mr. Rodriguez, do you know who was on the preferred list there of those names?

A. I don't know all the names personally.

Judge Thomas: All right, just stipulate on it.

Mr. Lang: Sir, to save time, we will put that in by stipulation later.

[fol. 88] Mr. Black: If Your Honor please, I had one other witness who is at work, and we were going to call him, by the name of Ottie L. Cochran. His testimony would be cumulative. He would testify, if he were here, that he sometimes works an eight hour shift at Warrior & Gulf Navigation Company, and then goes to the Harrison Company where he works another eight hour shift,

where he does the same work under the same foreman as he did at Warrior & Gulf Navigation Company.

Judge Thomas: Is that all right?

Mr. Lang: I am sorry. I didn't hear it.

Mr. Black: The testimony of Ottie L. Cochran, who is at work and whom we were going to call, would be cumulative. He would testify, if he were here, that he sometimes works an eight hour shift at Warrior & Gulf Navigation Company, and then goes to the Harrison Company where he works another eight hour shift, where he does the same work under the same foreman as he did at Warrior & Gulf Navigation Company.

Mr. Lang: We don't object to that, sir.

Judge Thomas: Very well. Call your next witness.

[fol. 89] Mr. Black: Your Honor please, with the stipulation that the contract is in, etc., Plaintiff Rests.

Judge Thomas: All right, call your first witness for the Defendant.

Wallace I. McElroy, being first sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Lang:

Q. What is your name, please?

A. Wallace I. McElroy.

Q. You are Vice President of Warrior & Gulf Navigation Company?

A. That is right, sir.

Q. How long have you held that position?

A. Since 1954.

Q. Prior to that time, what position did you hold with that company?

A. Superintendent of Operations, Safety Director, Purchasing Agent, Office Manager and stenographer.

Q. The company was first organized in what year?

A. The Warrior & Gulf Navigation Company was organized as a company in 1940 and incorporated in the State of Alabama.

Q. When did you assume the duties of Superintendent of Operations?

A. I am a little hazy on that date, Mr. Lang, but I believe it was about 1949 or 1950.

[fol. 90] Q. Between 1940 and 1949, what did you have to do, with reference to operations, if anything?

A. From 1940 to 1949, I was Clerk and Safety Director in the Terminal Superintendent's office there in Chickasaw.

Q. In the course of preparing for this case, have you examined certain records of the company?

A. I have, sir.

Q. What is the nature of the operations of this company?

A. We are what is known as a contracting water carrier, a carrier by water. We operate under the jurisdiction of the Interstate Commerce Commission. We have allocated rates. We publish a tariff. The scope of our operations is somewhat limited.

Judge Thomas: Does not the statement that you are a contract carrier fully cover it, other than where you operate?

A. Except to add this: that we are in direct competition with all other forms of transportation, with other barge carriers, the railroads, and the over land carriers.

Judge Thomas: I realize that.

A. We compete with them.

Judge Thomas: Where is your operation?

A. On the Warrior—Tombigbee River System between Birmingham and Mobile and the Gulf Intracoastal Water Way from St. Marks, Florida to Brownsville, Texas, also in the Gulf of Mexico, extending from Fort Pierce, Florida to Brownsville, Texas, also in the Mississippi River, [fol. 91] as far North as Memphis.

Mr. Lang: You carry various kinds of cargo?

A. We carry steel products, finished steel products Northbound or marine cargoes, all raw materials used principally in the steel mills or manufacture of steel.

Q. (Mr. Lang continuing): Was the company organized to be a ship repair company?

A. It was not, sir. We are strictly in the transportation business.

Q. Now, describe the history of the ship repair and construction work by your company from its inception in 1940?

A. We have always maintained a small repair force at our Chickasaw operations, to carry on miscellaneous barge repairs. We have considered it economical to do that over the years. At that time in 1940 we depended on the outside ship yards for dry docking services. We have no dry dock. Our facilities were very limited. Later on, when the war came along, the ship yards got over burdened with Government contract work and we were forced to build a sort of make shift dry dock to lift our barges up on one end, to make temporary repairs, whenever we could do so.

Q. This was the beginning of a period when you deviated from the original objective of maintaining a mere skeleton repair force and subcontracting all the rest of the work?

[fol. 92] Mr. Black: Objection on obvious grounds. That is the most leading question I have heard in my life.

Judge Thomas: Sustained.

Mr. Lang: Exception.

Q. (Mr. Lang continuing): Go ahead and describe what changes occurred, if any, in the repair and maintenance work in which you engaged?

A. Well, we depended on the outside yards for dry docking, as I said before, for our vessels. Immediately following the war—let me go back—in 1940, we had, as I recall, about six or eight mechanics.

Q. Suppose we do this, for the purpose of clarity. Can you give us the changes which have occurred in the years from 1946 to date, in the number of mechanics and helpers employed at your terminal at Chickasaw?

A. Yes, sir. I made some notations from the records of the company, in preparation for this. Can I read this?

Q. Would you read that, please? I would like to point out there was a misunderstanding this morning when I asked for the number employed. It was understood by one of the gentlemen at the table that I was referring to the first contract in 1952. In 1952, there were fifty-seven men in the total work force.

[fol. 93] Judge Thomas: You have asked him an all inclusive question.

A. We had in 1946 eight mechanics and an unknown number of helpers. I don't have that figure immediately available. In 1947 we had eleven mechanics and nineteen helpers. In 1948 we had a fluctuating situation there, sixteen to twenty-two mechanics and again I don't have the record of the number of helpers. I can get that from a further study of the records, if it is desired. In 1949 we had fifty-three mechanics and sixteen helpers, and a total of two hundred twenty-three wage earners covered by other union contracts. In 1950 we had thirty-seven mechanics and sixteen helpers, and a total of two hundred ninety-eight wage earners. In 1951 we had forty-seven mechanics and forty-five helpers, and a total of two hundred seventy-nine wage earners. In 1952 we had eighteen mechanics and twenty-nine helpers, for a total of one hundred eighty-two wage earners. In 1953 we had twenty mechanics and thirty-one helpers, two hundred thirty-three total wage earners. In 1954 we had twenty-two mechanics and twenty-eight helpers, two hundred seven total wage earners. In 1955 we had twenty-five mechanics and thirty-two helpers, two hundred sixty total wage earners. In March 1956, we had twenty mechanics, twenty-two helpers, a total of two hundred seven wage earners. In November 1956, we had fifteen mechanics and seventeen helpers, and two hundred seven I assume is correct for the total number of wage earners. January 11th, 1957, we had eleven mechanics and thirteen helpers, two hundred thirty-three wage earners total. Now, Judge, of those eleven remaining on the roll in 1957, two have subsequently retired, three have quit to seek other employment, so as [fol. 94] of 1958 we have six mechanics, seventeen helpers and a total of two hundred thirty-eight wage earners of all classes.

Judge Thomas: Go back to 1946 and give me the wage earners.

A. Eight mechanics. I don't have that figure, Judge.

Judge Thomas: In 1947, what is the number of wage earners?

A. I don't have that.

Judge Thomas: In 1948?

A. I don't have that. In 1949, there were two hundred twenty-three wage earners; in 1950, two hundred ninety-eight; in 1951, two hundred seventy-nine; in 1952, one hundred eighty-two.

Judge Thomas: I have the rest of them.

Mr. Lang: Now, you gave the figures of eleven mechanics and thirteen helpers in January 1957, and six mechanics and seventeen helpers in 1958. That is correct, is it not?

A. That is correct.

Q. (Mr. Lang continuing): The number of helpers increased by four?

A. That is correct.

Q. In referring to the total wage earners, which employees are covered there?

[fol. 95] A. We have our Port Birmingham operations, which includes longshoremen, and we have our unlicensed boat personnel that operate on all our tow boats, and, of course, we figure all of them in that figure.

Q. How about your licensed personnel, your engine and wheel house personnel?

A. The engineers are covered by a contract and are included in those figures. I presume they are covered by the marine engineers international.

Q. How many contracts do you have with labor unions?

A. Five.

Q. How many with the steelworkers, the plaintiff in this case?

A. Three.

Q. Which employees are covered by the steel workers?

A. The Port Birmingham longshoremen or stevedores and the unlicensed boat personnel.

Q. You mean dock hands?

A. Dock hands, oilers, cooks, mess boys and our repair force at Chickasaw.

Q. Dock hands, oilers, cooks, mess boys and your repair force at Chickasaw?

A. Yes, sir, and the other two contracts are with the Marine Engineers International Association, covering the engineers on the vessel and the master, mates and pilots association, covering the wheel house.

Q. All of those employees covered in the five union contracts make up the total figures you have given for total wage earners?

A. That is correct.

[fol. 96] Q. Now, would you please resume your counting of the changes which were made after the close of World War II in your repair operations?

A. I will have to go back, if the Judge will bear with me a minute. At the outbreak of World War II, we had two deep sea old type freighters that we operated in the open Gulf. We had three river tow boats that operated between Mobile and Birmingham. The War Shipping Administration requisitioned the two sea going vessels, which drastically curtailed our operations. In order to serve our customers in Texas, we utilized the inland route known as the Intracoastal Water Way, a new route which had opened up only a few years before. At that time, instead of bringing our loaded barges into Chickasaw and transferring the cargo into the deep sea vessels, we sent these barges through the inland route. The towing between Mobile and Texas was contracted out to outside towing concerns. At the end of the war, the Government returned our two old type ships but, at that time, the cost had increased to such an extent of operating those vessels that we did not consider it economical to attempt to operate them in the short haul service between Mobile and Gulf ports, so we disposed of them, and decision was made to purchase three tugs that had been declared surplus by the War Shipping Administration with which to carry on our towing operations between Mobile and Texas to

replace the two motor ships we lost or we disposed of. Based on our knowledge of the river operation and the knowledge we had gained of the canal operation between Mobile and Texas ports, we realized that the tugs were not the real answer to our problem, so decision was made to borrow a little more money and design a tow boat that would be a combination vessel that would operate success-
[fol. 97] fully both on the river and on the open waters of Mississippi Sound in the waters west of New Orleans. We secured a loan to build those vessels, but, prior to commencing the construction of those three ships, we had a sudden spurt of river business we were offered by shippers of increased freight, and we were faced with the necessity of immediately expanding our facilities in order to meet this increased demand, so we had to do something in a hurry. We bought a second hand used steamer from the Federal Barge Line, the steamer "Dwight Davis", which we brought to Chickasaw and converted from steam to Diesel.

Q. What period are you talking about?

A. This was in 1947 and 1948. Now, I would like to go back one little step. We had to decide whether we were going to build these three vessels ourselves, the combination boats, or whether we would contract them to an outside ship yard. The decision was made that we would contract the construction of the hull to outside shipyards, and this was done.

Mr. Black: We are not claiming the right to do any construction work. We have not claimed that right and do not claim it.

Judge Thomas: I think it is admissible. Go ahead.

Mr. Black: Exception.

A. We decided to expand our own little work force at Chickasaw, to bring the completed hull to Chickasaw and outfit it. At that point,—this was immediately following the war, in 1946, new vessels were unavailable, and we
[fol. 98] had to buy a lot of surplus Government stuff. Those vessels were of a particular design by the President of the company and our marine superintendent, and

we felt that a better job and closer supervision could be made if we outfitted those vessels at Chickasaw, by expanding our little work force to do it. But getting back to the "Dwight Davis", this came in after these plans had been made and decision had been made to step up our crew, so we utilized this crew to convert the "Dwight Davis" to Diesel. We were in need of barge equipment. We bought four used barges from Federal Barge Line and brought them to Chickasaw, where we put new bottoms on, by this capsizing method we had designed. We also had to acquire ten new barges from an outside ship yard. Well, after we completed those three vessels which was—I—will look at this level of employees to tell—in 1951.

Q. As you put these three vessels, one at a time, in service, what was your experience with reference to their operation from the standpoint of maintenance?

A. We found out—we had gone out in them and we found they were not suitable. They were not of a design suitable for that operation, and we began to have a lot of trouble with them.

Q. What effect did that trouble have on the maintenance work in your yard?

A. We had to have a crew of men to start building installations or changing bearings and generally do unusually heavy maintenance work.

Q. With respect to age only, how long had those three combination boats been in service?

A. A period of over two years at that time, the oldest one.

[fol. 99] Q. What further developed, with reference to these boats, on the question of maintenance, repair, and so on?

A. We decided then and there the most economical thing to do was to pull those engines out of the boats and put in a type that had already proven itself in some of our other boats, by changing the engines in those three boats, we could standardize the engines. We got additional engines and brought them in and overhauled those engines there.

Q. Was that a minor or major undertaking?

A. Major.

Q. As those vessels were being re-conditioned, were some kept in operation?

A. We had to build one at a time, in order to maintain the rest of our service.

Q. So the repair work was carried on over a considerable period of time for the three of them?

A. That is correct.

Q. What else occupied this work force in the years which followed up to November or December 1957?

A. We also found it necessary to re-power the two vessels that were twenty some odd years old, so we brought those in and stripped the old twenty year old engines out of them, and put G M engine in there, that we had had so much experience with in the past. In addition to that, following World War II, business on the river continued to increase, and we felt it necessary from time to time to acquire additional barges. Along about that time, decision was made to build another new tow boat, the "Hugh Parker". That was built on a contract basis with an outside ship yard, and brought to our yard at Chickasaw, where close supervision could be had of outfitting it, and that vessel, I believe, was placed in service about 1956. The construction of that vessel was going [fol. 100] on at the same time the re-powering jobs were going on, on the other three vessels.

Q. Was this last construction work complete late in 1956?

A. Yes, sir, it was. The "Hugh Parker" was placed in operation in late 1956.

Q. Do you remember the month?

A. It must have been somewhere around October or November, somewhere in there.

Q. Did you or your company thereupon cease its construction work which had begun in 1947?

A. That is correct.

Q. In addition to this construction and major repair and overhauling that you have described, in the intervening period, did you engage in the construction of facilities other than marine facilities in order to take care of this work?

A. Yes, in increasing the fleet, our expanded fleet, of course, required more facilities in the nature of store room and warehouse and other miscellaneous buildings, and the installation of a new dock. We also made a major change in the rigging in which these barges were hooked together, we installed fixed rigging on one hundred and two of the company's barges.

Q. After all this construction was completed in 1956, was there any further need of the expanded force, the force that had been expanded from 1947, off and on, to the Fall of 1956?

A. No, sir, we had reached the end of our expansion program, and were leveling off to the more or less routine transportation operation.

Q. During all this period which you have described, from 1946-1947 to 1956 and indeed to this date, has [fol. 101] your company done all the repair and maintenance work which has been performed on its equipment?

A. No, sir.

Q. Has there been any time from 1940, when the company was started, to this date, when the company has not continuously subcontracted out various portions of that repair work?

A. We have always depended on these outside ship yards for a large part of our repair operations. We are really dependent on the outside yards and consider them just as essential to our operations as our repair force at Chickasaw, because many times we have to call on them in emergency situations for repair work of all nature.

Q. In the figures you have given, showing the fluctuations in the work force over the years, between 1946 and this date, you show lay offs from time to time, do you not?

A. Yes, sir.

Q. During those period of lay offs, were you continuing this practice of subcontracting this work out?

A. We did. We have never changed our policies from the inception of the company of contracting our work, as we saw fit.

Q. What has been the reason for the subcontracting of this work?

A. It is strictly an economical matter. For one thing, we don't have adequate facilities to take care of all repair work that goes on on a tow boat fleet of our kind. We do have a dry dock, which I failed to state we purchased at the close of the war, a surplus Government dry dock, at which we could dock our small towboats, and we really take care of a lot more repair work of that nature today than we did in the past.

[fol. 102] Q. Was there any reason for the maintenance of this larger force in the period between 1947 and the end of 1956, other than this continuous new construction which you have described?

A. There was absolutely no reason.

Q. Did you, during that period, also engage in repair work of the character which you were subcontracting out?

A. Yes, we did, as the occasion permitted. We had this crew and these jobs didn't run exactly in succession. We had this large force. We used this repair force on work to a great extent as a fill in to keep this force occupied.

Q. Now, you say it was a matter of economy, which has prompted you to subcontract this work out. Has there been any reason other than that, other than economy?

A. I cannot think of any other reason. All of our operations in repair were certainly part of our over all cost and we take a look at this thing from an over all stand point, when we decide whether a job should be done at Chickasaw or whether we can do it more efficiently at some other yard.

Q. Has there been any difference since the Union became the bargaining representative of these particular employees at Chickasaw?

A. No, there has not. In fact, I remember some figures in 1954 when we repaired barges under subcontract with an outside and out of state concern, to the extent of $234,000.00. Subsequent to that, we have let out other work of varied amounts. I can cite you some of the figures. I have jotted down a few.

Q. Will you, please, sir?

A. This is in 1954, of course, the $234,000.00. This does not represent complete figures. All we could do here on [fol. 103] the short notice we had was to refer to records

that were immediately available. We can with a more extensive study improve on these figures considerably. In 1955, there was $33,940 contracted repair work. In 1956, I might say that 1955 amount was paid to four of the yards here in Mobile—in 1956, $37,484.00, in 1957 there was $41,162.00.

Q. Referring to 1956 and 1957, did you have any one contract that occupied a substantial portion of that cost?

A. What year was that?

Q. 1956, first?

A. Yes, I believe as a matter of fact we did have one large contract, included in that figure there, a lump sum that was covering some major job. I don't exactly recall the nature of it.

Q. The total figure in 1957 was how much?

A. $41,162.00.

Q. Was there a major job in that year also?

A. Yes, sir, a large job ran pretty close to $40,000.00, which was converting some canvas covered barges to steel lift off covers.

Q. When you say it is more economical to subcontract this work out, what factors do you take into account in determining that?

A. Certainly, we take our wage scale into consideration. We take the overhead, the use of our facilities, supervision, the time required to do the job, the time required to assemble material and put it on order.

Q. Are you equipped to do every job which you subcontract out in the way of repair?

A. No, sir, we are not.

Q. What are your limitations in that respect?

A. We are equipped only to carry on minor repairs.

[fol. 104] Q. Are you equipped to carry on repairs where several barges need repair at the same time?

A. If those barges require dry docking, we are not. We only have one dock and we can only dock one barge at the time.

Q. What would be the effect on your operations of dry docking and repairing these barges, one at a time?

A. It would completely wreck our capacity to serve our customers. The only way we can use these barges is in

transportation. If they are tied up at the dock, they are not earning any remuneration.

Q. Are you limited with respect to supplies of various kinds, which are carried on hand as a matter of inventory by these subcontracting yards?

A. Yes, we carry very limited amount of spare parts or equipment in the way of plates and rods and things of that sort.

Q. What would be required in the way of equipment for facilities—

Mr. Black: I thought we made it clear we were not claiming work that could not be done at that terminal. We have told them over and over again we are not asking for work that cannot be done at the terminal.

Judge Thomas: Sustained.

Mr. Lang: Exception.

[fol. 105] By Mr. Lang (Continuing):

Q. As a practical matter, suppose that your company were ordered as of this date to perform on your yard, with your own people, including people laid off, who are entitled to recall, instead of subcontracting out work, which you are not equipped to have done on your yard, how would you go about complying with that order?

Mr. Black: Objection. We are not trying to get them to do that.

Judge Thomas: Overruled.

Mr. Black: Exception.

A: Well, frankly, it would, I think, just wreck our operations, sir, to do that work on our yard, all of that work there on that yard. When those barges come in a lot of times we have no notice that those barges are in need of repair, we have to do it on quick notice. I can foresee that every time, if we were bound by such restriction, we would have to enter into arbitration proceedings whether we could do a job at Chickasaw or whether we could not. So many jobs require outside machine shop work, such as framing plates.

By Mr. Lang (Continuing):

Q. Suppose you had the equipment or facilities to perform the work?

A. The work comes sporadically. There is the matter of dispatching the equipment. We would have to call these men and have them stand by every day. In order to fully [fol. 106] protect our operation, we would have to have all these men reporting every morning to see whether we had any work that needed taking care of. We would have to order repair supplies, plate, and stuff of that sort. The job would have to await the arrival of that equipment, and we would have to wait until we could get these fellows on the job, and it would, as I see it, just be no end of trouble.

Q. Suppose you had a job that required just one-half an hour, but you could not perform that work with the force that you had on the yard, because it was busy, but you needed that job done right away, how would you go about complying with the order to call your laid off men?

A. We would have to call the men and pay them, a mechanic would be paid for four hours to do the job, which would be uneconomical.

Q. Do you have jobs like that that you subcontract?

A. Frequently.

Q. Of very short duration?

A. That is right.

Q. Do you deny that some of the work which is done by companies to which you subcontract is similar or the same as work which is done on your yard?

A. They do work that we are capable of doing. There is no question about it.

Q. What other circumstances are there in which these subcontracting yards do the same kind of repair work that you do on your yard?

A. Well, sir, they have a regular crew of men. These yards depend not only on us but on the other barge operators on the river. They have a constant force and standing facilities sitting there waiting for this type of work, so we can dispatch a barge down there and have it [fol. 107] on the water before we can think about it ourselves.

Q. Is it practicable for you to do that much of the work that can be done on a particular barge in your yard, and then dispatch it to the subcontractor to complete the work on that barge?

A. That would be entirely impracticable and uneconomical.

Q. Does that account for some of the work being done by subcontractors that could be done on your yards?

A. Yes.

Q. There has been testimony here that two men from your yard go over to the yard of the subcontractor doing work on your equipment. Do you recall the testimony in that respect?

A. I do.

Q. Are representatives of your company sent over to the yards of subcontractors while work is being done on your equipment?

A. Yes, sir.

Q. Who are those representatives and why are they sent there?

A. One of these men is Mr. Ivan H. Martin, a graduate engineer, who goes down to the yard with the barge, or by the time the barge gets there, he tries to be there, to go over with the job contractor what is to be done, and then, as a matter of fact, he stays there or goes back and inspects the work after it is done. That is the extent of his work. He is down there under our instructions to see that we get a good job and to tell them what work we want done.

Q. Are any other representatives sent by your yard?

[fol. 108] A. They are sent strictly as a matter of inspection. We don't use Mr. Martin exclusively. Sometimes he is tied up on an engineering job. We might get another supervisor who is experienced.

Q. Do any of the representatives of your company go down to the yards of the subcontractors to directly supervise the workmen?

A. They have no such instructions.

Q. Now, are you familiar with the other water carriers operating on the rivers on which you operate?

A. Yes, sir.

Q. How many such navigation companies are there?

A. According to U. S. Engineers' figures available, there are some thirty-four barge operators on the Warrior-Tombigbee System.

Q. Those are different companies?

A. All different companies.

Q. That includes your company?

A. Yes.

Q. How many of those maintain repair yards?

Mr. Black: Objection, as irrelevant.

Judge Thomas: Sustained.

Mr. Lang: Exception.

By Mr. Lang (Continuing):

Q. What is the practice in that industry?

[fol. 109] Mr. Black: Objection, for the same reason.

Judge Thomas: Sustained.

Mr. Lang: Exception.

By Mr. Lang (Continuing):

Q. Do you negotiate the labor contracts with the various unions which have contracts with your company?

A. I do.

Q. This labor contract which is involved in this case here also includes the deck hands on the floating equipment, does it not?

A. No, I believe that is a separate contract.

Q. But it is with this same union?

A. Yes, sir.

Q. The Plaintiff here?

A. That is right.

Q. Now, do you subcontract out any of the towing work done by your company?

Mr. Black: Objection, as irrelevant.

Judge Thomas: Sustained.

Mr. Lang: Exception.

[fol. 110] By Mr. Lang (Continuing):

Q. I believe you said you did negotiate for the company the contracts with the Plaintiff?

A. Yes, sir.

Q. Did you negotiate the first contract with the Plaintiff in the year 1952?

A. Yes.

Q. And the contracts subsequent to that?

A. Yes, sir.

Q. The last one being the one in evidence here?

A. Yes, sir.

Q. During the negotiations of the current contract in the latter part of the year 1956, was any reference made to the impending further reduction in the work force of those maintenance people?

A. Yes, sir, and I so stated to the Union Negotiating Committee, that we were fast approaching the end of our construction program, when we would exhaust the capital funds which we had set aside for that expansion, and we would return to a more or less routine transportation, and we would have to reduce our force.

Q. When was that contract, which is Exhibit A to the complaint in this proceeding, when was that contract actually executed?

A. In November, I cannot recall the date, but it was some months after the effective date of the contract.

Q. You mentioned November. Is that the month in which you actually signed the agreement?

A. I believe it was November.

Q. November 1956?

A. Yes, sir.

Q. But it became effective September 25th, 1956?

A. That is correct. That was the expiration date of the prior agreement.

[fol. 111] Q. That was the expiration date of the prior agreement?

A. Yes, sir.

Q. Now, did you at the time you effected that further reduction in November 1956, refer to your previous statement that it was going to be done?

Mr. Black: Objection.

Judge Thomas: Overruled. You brought it out.

Mr. Black: Exception.

A. Yes, sir, I called these men together on the yard.

By Mr. Lang (Continuing):

Q. The men who were being laid off?

A. I called the entire crew, not only the men who were being laid off. I repeated to them that I had told them in negotiations that we were not able to carry on the large crew that we had on strictly maintenance work, that the construction period was over, that we had to cut back the force to the size that we felt like we could keep occupied.

Q. In those negotiations prior to the execution of this current agreement, what discussion, if any, was there about this practice of subcontracting out work?

A. It was specifically mentioned by the Union Negotiators that we were contracting out work. That was one of the issues under discussion at the negotiations.

Q. Toward what end?

[fol. 112] A. That we were contracting work out that would deprive members of their union of work.

Q. How did the Union make that an issue in the negotiations of the new contract?

A. Well, they brought it out, in the conversations, as one of their demands, in addition to wages and other fringe benefits.

Q. What was that demand they were making for the new contract?

A. They were demanding that we discontinue the practice of letting this work out to contractors and depriving their members of work.

Q. Was that demand granted by the company?

A. No, sir, it was not. I went to great length to explain to them very much of what I have said here on the stand, that we had reached the end of our rope, as far as the construction program was concerned.

Q. Do any of the company's contracts with any of the five labor unions contain any provisions limiting the company's right to subcontract work?

A. They do not.

Q. Has the company ever had a contract with any labor union limiting that right?

A. It has not, sir.

Q. Has the Plaintiff Union in years prior to 1956 attempted to obtain the same limitation in its contracts?

A. It was brought up in the negotiations in 1952. I want to go back and correct a wrong impression I may have given. In 1952, I don't believe I was Vice President. Mr. Guthens was Vice President and directly in charge of negotiations, but I was present at the negotiations and participated in them. I do know this was an issue at that time.

[fol. 113] Q. Now, has the company laid off any maintenance men, any of the men we are talking about in this proceeding, since January 11th, 1957?

A. No, sir, we have not. As a matter of fact, we have added to our helper force from thirteen to seventeen men.

Q. What is the net number of mechanics and helpers laid off by the company since November of 1956, considering the retirement of two and the resignation of three mechanics?

Mr. Black: I don't believe there has been any evidence of the retirement of two and the resignation of three.

Judge Thomas: That was testified to. Overruled.

Mr. Black: Exception.

Judge Thomas: I don't know about the three. I know there was testimony about the retirement of two. There was some testimony about some quitting.

Mr. Lang: I think the net number would be competent. Do you have that net number? In other words, the difference in the net of laid off mechanics and helpers, since January 1956?

A. Four mechanics and one helper is the net result.

[fol. 114] By Mr. Lang (Continuing):

Q. The net result of the reduction in force?

A. Yes, sir.

Q. Now, is the net reduction of four mechanics and one helper attributed in any way, or can it be attributed in any way to the subcontracting out of this work to outside repair yards?

Mr. Black: Objection. That invades the province of the Court.

Judge Thomas: Overruled.
Mr. Black: Exception.

A. No.

Mr. Lang: Have you stepped up the subcontracting of this work to outside repair yards for the purpose of discriminating against the Plaintiff Union or its members?
Mr. Black: Same objection.
Judge Thomas: Overruled.
Mr. Black: Exception.

A. No, sir.

Mr. Lang: Or for any purpose other than consideration of economy, efficiency and expediency?
[fol. 115] Mr. Black: Objection.
Judge Thomas: Overruled.
Mr. Black: Exception.

A. No, sir.

Mr. Lang: Between November 1956, when the first reduction in this work force was effected, following the exception of this current agreement, and August 22nd, 1958, was any grievance presented to the company, complaining that the company did not have the right to subcontract out work, or to reduce the work force?

A. No, sir.

By Mr. Lang (Continuing):

Q. Was any demand of any kind made upon the company during that period between November 1956 and August 22nd, 1958, to take that matter to arbitration?
A. No, sir.
Q. Was any suggestion made during that entire period that the company was violating the contract, in subcontracting out this work and reducing that work force?
A. No, sir. May I make one observation?

Mr. Lang: Please do.

[fol. 116] A. With all those fluctuations in employment from 1947 through 1957, I would like to point out we still

have practically the same sized force as when we originally started this construction program. There has been no change. As a matter of fact we have stepped up our employment in another classification, which are the tow boat crews.

By Mr. Lang (Continuing):

Q. All of those are union members?

A. All of those are union members. There has been a net gain in the number of union employed people in our company.

Q. Reference has been made to the fact that no foremen have been laid off since the Fall of 1956, despite the reduction of the number of employees under them. Can you account for that?

A. Yes, sir, I can. Our master mechanic, Mr. Nichols, has reached retirement age and will be retired as of the first of January. Our port engineer, who has also reached the age of sixty-five, will be retired in the coming year. We anticipated that. Now, these supervisors that they referred to, are not only engaged in supervising this small repair force on the yard. They are engaged in the supervision of the tow boat crews. We frequently have to send our port engineer up the river to make the inspection and see that these engine room crews are carrying on their duties. Then, too, the deck crews are engaged in maintenance work and come under the supervision of these men.

Q. There has been no diminution in the amount of work for these foremen?

A. To the contrary, there has been an increase. We have a greater number of employees today.

[fol. 117] Judge Thomas: What is the net result in the layoff of mechanics and helpers since September 25th, 1956? Is it the same as since November 1956?

A. Five additional, Your Honor, which would mean a total of nine.

Judge Thomas: You testified that four mechanics and one helper is the net result of the layoffs since November 1956?

A. Yes, sir.

By Judge Thomas (Continuing):

Q. Is that figure true since September 25th, 1956?

A. Since September, yes. It is true up to date, if I get your question correctly.

Q. The contract is dated September 25th, 1956. It was executed in November 1956. You have testified the net result of layoffs since November 1956 were four mechanics and one helper. Is that true since September 25th, 1956?

A. No, sir, this latest reduction took place, as I recall, in November, but shortly after the signing of this agreement.

Judge Thomas: I don't follow you.

A. We signed that agreement in November, I believe, if I recall correctly. Well, it was in November that we made an additional layoff.

Judge Thomas: Well then, since September 25th, 1956, the net result of layoffs is four mechanics and one helper, is that right?

A. I think so.

[fol. 118] Mr. Lang: May it please the Court, I believe I can get the witness straightened out. What the Judge wants to know is this: Is there any difference in the net result between the people who have been laid off from the date the contract was signed in November, and the date it was back dated in September, September 25th, 1956?

A. No, the net result is still four.

By Mr. Lang (Continuing):

Q. You testified that in November 1956, you had fifteen mechanics and seventeen helpers?

A. Yes, sir.

Q. In March 1956, you had twenty mechanics and twenty-two helpers?

A. That is correct.

Q. That was correct?

A. Yes, sir.

Q. So that subsequent to the signing of the contract in

September, you reduced each category by five, to fifteen mechanics and seventeen helpers?

A. That is correct.

Q. So that there were five mechanics fewer and five helpers fewer after the signing of the contract, through the month of November?

A. That is right.

Q. Then, there were four more mechanics fewer with the eleven to which the force was reduced on January 11th, that is the total of nine fewer after September 25th, is it not?

A. You are right. That is the figure I had in mind a while ago, nine.

Q. That figure of nine was reduced by five, with those quitting and retiring?

[fol. 119] A. That is correct, sir, leaving four.

Q. Leaving a net of four. Now, on the helper side, you reduced the number from twenty-two in March to seventeen in November. There were five less after the contract was signed?

A. That is correct.

Q. You have seventeen helpers today, an increase from thirteen in January of 1957?

A. That is right, sir.

Q. So, you have five fewer helpers today than you had when the contract was signed on September 25th do you not?

A. That is correct.

Q. So you have four mechanics and five helpers fewer than you had on September 25th, 1956?

A. Yes, sir.

Judge Thomas: Among the mechanics, two retired and three quit?

A. Yes, sir.

Judge Thomas: What happened to your helpers, do you recall?

A. That was a reduction in force.

Judge Thomas: Then, actually, the reduction is four mechanics and five helpers, is that right?

A. Yes, sir.

[fol. 120] Cross-examination.

By Mr. Black:

Q. Mr. McElroy, I understood you to say that there had been a net layoff of four mechanics, is that correct?

A. That is correct.

Q. I believe you testified that two men had retired and three had quit, is that correct?

A. That is correct.

Q. You deducted that figure of five from the figure nine you had, is that correct?

A. Yes, sir.

Q. So you said there were four men net layoff?

A. That is the net result.

Q. Will you tell the Judge what five men you got to replace the men who quit or retired?

A. Sir?

Q. Did you recall anybody to take the place of any of those men?

A. No, sir.

Q. The nine men that were laid off originally are still laid off?

A. Yes, sir, but the net result is still five.

Q. The net result to those nine men and their wives and families is they are out of work?

A. I don't know their status.

Q. The net result, so far as their working for Warrior & Gulf Navigation Company is concerned, is that they don't work there?

A. That is right.

Q. These retirements didn't affect that vital thing, sir, one little bit?

A. It affected the net result.

[fol. 121] Q. Did any of the nine men get called back?

A. No, sir.

Q. The nine men are still laid off, are they not, sir?

A. They are.

Q. All right. Now, Mr. McElroy, you stated another thing. You stated that you sometimes had little jobs of one-half an hour, where if you called a man in to work

you had to pay him for four hours, so, therefore, the cheapest thing was to send the job to somebody else to do the one-half hour's work, is that correct?

A. I think that has happened in the past. I don't know all these little instances.

Q. I understood if to be your testimony that sometimes you had instances where the repair jobs would only take one-half an hour and if you were to do the work at your place you would have to pay the men for four hours work?

A. The question was put to me if I had a half hour job what would I do.

Q. Do you have any one-half hour jobs?

A. Specifically, I could not answer that question, but I assume we had many, many such jobs.

Q. You assume that if you had to call a man in you would have to pay him for four hours?

A. According to the terms of the contract.

Q. Therefore, it would be cheaper to get someone else to do the job?

A. In many cases.

Q. How many hours would it take that barge to go from your place down to Harrison's?

A. I would say approximately forty-five minutes to an hour.

Q. You have three men on that barge, do you not, while taking it down to Harrison's?

[fol. 122] A. You are assuming that barge is at Chickasaw. You misunderstand; these barges come in from Birmingham on the river. If we had a barge that was damaged, we would drop it off at Harrison's inbound. We would not bring it to Chickasaw.

Q. Assuming that was at Chickasaw and was going in the direction away from Harrison's past Chickasaw, in that direction, how long would it take to get from there to Harrison's?

A. Forty-five minutes.

Q. You would have to have three men on the barge?

A. Let me make this clear.

Q. Just answer my question, please?

A. That barge is towed from Chickasaw down the river to the ore loading terminal, where it is loaded, and if it

was moved to Harrison's, it would have completed part of that trip, so it would shorten the distance required, so the net result would be no extra expense.

Q. Assume that the barge came past Chickasaw and took forty-five minutes to get there, would you have three men on the barge?

A. No, sir.

Q. Would you have three men involved in that operation?

A. Three on our tug.

Q. You would have to pay all three of them for forty-five minutes?

A. That is correct.

Q. You would have to pay them a substantial amount of money?

A. The wages called for.

[fol. 123] Q. Just going down there, alone would take more money in wages than it would to call the one mechanic and pay him for four hours?

A. I would not say that. There are too many variable factors involved. That tug does not leave Chickasaw with just one barge. It leaves sometimes with four or five barges. You are asking me to describe a situation that we—

Q. We will leave that subject. You don't seem to want to answer that question.

Judge Thomas: I think he has answered the question. You may not like the answer, but he has answered it.

Mr. Black: I have no objection to the answer. The answer was fine. It was not complete.

Judge Thomas: Go ahead. Proceed.

Mr. Black: I am sorry if I gave offense to the Court.

Judge Thomas: Go ahead.

Mr. Black: Mr. McElroy, the document, which was brought into the negotiations in 1956 by the steelworkers and from which the proposal you testified about was made, was this document I am showing you here, is it not, sir?

A. No, sir. This document was never submitted to me in any negotiations.

[fol. 124] By Mr. Black (Continuing):

Q. All right, sir. I will ask you if this was a proposal made to you concerning contracting out?

A. The contracting out?

Q. The contracting out of work only by local mutual agreement?

Judge Thomas: Do I understand you correctly that this was the original proposal made by the Union?

Mr. Black: The original proposal made by the Union to all United States Steel Companies and their subsidiaries, yes, sir.

Judge Thomas: It was?

Mr. Black: The same proposal made to the Wage Stabilization Board that I referred to earlier?

Judge Thomas: It was the proposal in the contract in question here?

Mr. Black: Yes, sir. Is that the proposal that was made to you?

A. This proposal you have in your hand was never made to me, no, sir.

By Mr. Black (Continuing):

Q. That proposal was never made to you?

A. You are speaking of the one you showed me?

Q. Yes, sir?

[fol. 125] A. No, sir.

Q. Well, was this proposal made to you, were these words said to you in the form of a proposal? Contracting out of work only by local mutual agreement, were these words presented to you in writing or in words at the 1956 negotiations?

A. I don't recall that those specific words were read or said at the negotiations. I do recall that the issue of contracting out work was brought up. I don't recall that it had anything to do with any mutual agreement. I think that the request was that the company quit contracting out work period.

Q. Mr. McElroy, do you have an assistant by the name of Mr. Fulmer?

A. Yes, sir.

Q. Do you recall in May 1958 a committee of the Union calling upon Mr. Fulmer and complaining about the contracting out practice of the company now that those men were laid off?

A. I don't recall. What date was that?

Q. In May 1958, sir?

A. I don't recall any such meeting. If it was held, it was not reported to me.

Q. In the year 1957, did the company dredge out a new slip at the Chickasaw terminal?

A. In 1956?

Q. In 1957, sir?

A. In 1957, no, sir, we had no new dredging slips in our place since the company was organized in 1940. We have done some maintenance dredging, to keep those slips deep enough for our boats to come in and out.

Q. Do you recall when the electric winch was installed?

A. I know one was installed.

[fol. 126] Q. When?

A. I don't recall the date.

Q. Your best estimate, please, sir?

A. That winch was installed possibly a year or a year and a half or two years ago.

Q. What was the purpose of installing it?

A. We bought that winch because it was available as a piece of surplus equipment, with the thought that if we ever got back into this business of turning barges again at our Chickasaw terminal, it would be a good piece of equipment.

Q. You bought the piece of surplus equipment and installed it?

A. It is not installed. It is set up in concrete. The motor is not on it and neither is the electric power.

Q. It will take about a day to put that on?

A. I am not engineer enough to answer that.

Q. It will not take in excess of a day?

A. I don't know.

Q. Simultaneously with the installation of that winch, did you install two pilings?

A. Yes, sir.

Q. What was the purpose of installing those pilings?

A. Sir?

Q. Those pilings were also to be used in the contemplated barge turning operations, were they not?

A. Here is what happened. During the time we were having some mooring installations at our terminal, he had his pile driving equipment up there, and, while he was there, we utilized some second hand H. beams, while he was up there and had all his equipment on the job, it was an opportune time to let him shift over to the other [fol. 127] side of the slip and drive these two piling, again with the thought that one of these days we might want to turn a barge.

Q. Simultaneously with the installation of those pilings, did you also dig out the water in between the winch and the pilings underneath?

A. No, sir, not simultaneously.

Q. All right, about that time, did you also dig out underneath the water at that particular point?

A. No, that was one of the jobs involved in installing a new dock out there. If these fellows will recall, we bought a concrete barge from the City of Kansas City, and we moved it to Chickasaw, and we took the warehouse or building apart off the barge and rebuilt it there as a warehouse building or storage building, then we used the concrete barge to sit up on piling to provide extra mooring space for barges, to provide a dock on which we could paint our barges. At that time, we employed the services of a dredge to dredge out on both sides of that dock, and also dredge out our slip. We re-located our dry dock from the south end of the slip to the north end of the slip. We were going to reserve the south end of the slip for nothing but tow boats to come in and re-fuel and for their miscellaneous voyage repairs, and reserve the north end of the slip for the dry dock. We had to dredge the north side of the slip, in order to have water to raise and dock the boats.

Q. Is that dry dock there now?

A. Yes, sir.

Q. On the north side?

A. Yes, sir.

Q. What do you have on the south side?

A. We have our tow boats.

Q. That is the side where the winch is?

A. That is correct.

[fol. 128] Q. That is the side where the pilings for the barge turnings operations are?

A. That is true.

Q. It is true, as I asked you in the beginning, that that side has also been dug out underneath the water, for the purpose of turning barges?

A. That is exactly where we would turn a barge.

Q. That is the purpose of those three things, the pilings, the winch and the digging out underneath the water?

A. The digging out was simply a maintenance item. We have done that before and will do it again. Those slips fill up.

Q. You did do it at the time you put the winch up and the pilings in?

A. Somewhere along there, yes, sir.

Q. Mr. McElroy, when you were giving your figures, sir, for the contract repair work done in the various years, I notice that you left out 1958. Do you have those figures with you?

A. No, sir, I don't. I can give them, I think from memory. They would run about $48,000.00 . . . through September.

Q. That is substantially in excess of the contract repair work that you had done in the other years which you already referred to, which you reported on?

A. In the figures I reported, I believe I prefaced this by saying this was not our complete record. I would be glad to submit to the Court a more accurate figure. This was stuff I could get my hands on immediately. Our records are all stored.

Q. By September of this year, you had already done in excess of more than $10,000.00 more repair work than you had done in any year before?

[fol. 129] A. No, in 1954, if you recall my figures, we contracted out $234,000.00.

Q. You put the new bottoms on barges?

A. That and other miscellaneous items.

Q. From 1955 on, you never had any contract repair work such as we are talking about here now?

A. We had some in 1955. I think the figures speak for themselves.

Judge Thomas: What year was the $234,000.00?

A. 1954.

Judge Thomas: What did that consist of, a big job, little jobs, or what?

A. The bottoms of these barges usually last twelve to sixteen years, then you have to bring them in, and either put the barge on dry dock and install a new bottom, if the deterioration on the barge is too much, or you may repair the barge by a replacement.

Judge Thomas: What did the repair work consist of?

A. Replacing the bottom.

By Judge Thomas (Continuing):

Q. How many barges did you replace the bottoms, roughly?

A. That was either fifteen or eighteen barges.

Q. Was that the larger portion of the $234,000.00?

A. Yes, sir.

Q. Do you recall what it ran per barge, roughly?

A. I believe it is in the neighborhood of $15,000.00. That [fol. 130] is counting the material, labor and all.

Q. You testified in recent years—I remember one year particularly, I don't remember the date, the figure was $41,000.00. You said $40,000.00 of that was one job. What was that job?

A. That was a series of barges. I don't recall the exact number. It was an old type barge, equipped with canvas tarpaulin and wooden hatch boards, built in 1928, and we had an opportunity to acquire some steel covers from another company,—it was merely a matter of converting, ripping all of the old barge wooden hatch covers and tarpaulin, and installing these steel covers with a metal lift off.

Q. That would not require dry docking?

A. No, sir.

Mr. Black: Mr. McElroy, for the major job, where did you have that 1954 work done?

A. A portion of that work was done in Orange, Texas.

By Mr. Black (Continuing):

Q. Where was the rest of it done?

A. I think one barge was done in Mobile.

Q. All the rest was done in Texas?

A. Yes, sir.

Q. This Union does not represent any of your employees in Texas?

A. We have no employees in Texas.

Q. Did the Union ever request you to make any comparison of the relative expense of doing the work on the contracted out basis and doing it there at the yard?

[fol. 131] A. We are constantly making such comparisons, to determine which is the most economical way of doing it.

Q. Did the Union ever ask you to make such a study, let's say, of turning over a barge?

A. No, sir.

Q. Do you know what a rake job is?

A. Yes, sir.

Q. Did they ever ask you to make such a study with reference to a rake job?

A. No, sir.

Q. With reference to any job?

A. No, sir, not that I recall. There has been, I believe, your claim that at one of those meetings we have had recently somebody had been keeping time on a job putting a new floor in a barge. I don't know but I guess their object was to try to determine whether or not we were doing the job cheaper at Chickasaw than we could do a similar job at a shipyard.

Q. At that meeting you are speaking of, do you remember Mr. Cloud being there?

A. Yes, sir.

Q. Do you remember he asked you a number of times whether some of the work could be done cheaper at the Chickasaw terminal than contracting it out?

A. Yes, I believe he did.

Q. He asked you a number of times, didn't he?

A. I don't know how many times.

Q. Do you remember Mr. Rodriguez asked you if any of these jobs saved you anything, with respect to costs, by contracting the jobs out?

A. He may have, I don't know.

Q. A number of people asked you if you saved any money by contracting this work out?

A. That is right.

[fol. 132] Q. You never did say you saved a penny by contracting this work out, although you were asked a number of times by myself and a lot of other people, you refused to make that statement?

A. As I recall, I made the exact statement that all of our repair work is based on an economical situation, and I think a discussion followed as to what the definition of economical was. That is the answer I gave, strictly and purely a matter of economy.

Q. I believe you said "we combined our costs", were not those the words which you used?

A. I don't recall that.

Q. You never did say you saved a dime by contracting out work, although you got every opportunity to say so?

A. I can ask you, Mr. Black, what does the word "economy" mean. Certainly we saved money. We saved hundreds of thousands of dollars.

Q. All right. If you saved hundreds of thousands of dollars, will you tell this Court how much it would cost you, sir, to turn over one barge at your Chickasaw terminal, and put a new bottom on that barge at your Chickasaw terminal, would you tell the Judge what the total cost would be, as compared to doing the same thing at Harrison's?

A. I have no way of knowing.

Q. Can you give the Judge one specific instance of one specific operation where you saved money by shifting the work from your Chickasaw terminal to another place? Can you give us any facts other than your general statement?

A. No, sir, I have no facts of that sort I can give you. I can get them.

Q. You don't have them here today though, do you?
[fol. 133] A. No, sir.

Q. Now, at other times when you have been contracting out work, since the Union has come in, other than here recently, that is repair work or patching up bottoms, etc., at other times when you have had that kind of work and have contracted out that kind of work, there have been no employees laid off?

A. Yes, sir.

Q. Tell us when a number of employees were laid off, when you contracted that kind of work out give us the month and date?

A. I can tell you that every year since 1946 we have contracted out innumerable jobs and people have been laid off, and in 1947 each time our force fluctuated, and in 1954 when we contracted out the work on the bottoms of fifteen or eighteen barges—I forget the number—we only had twenty-two mechanics employed at Chickasaw at that time, whereas in 1951 we had forty-seven.

Q. I want to know which mechanics you laid off just prior to shifting that job out?

A. You mean by name?

Q. Yes, sir, if you know?

A. I have no idea.

Q. Tell us how many mechanics you laid off and when you laid them off?

A. I can repeat this list of statistics that I have gotten.

Q. What year are you talking about?

A. 1954.

Q. In 1952 you had eighteen mechanics?

A. That is correct.

Q. In 1954 you had twenty-two mechanics?

A. That is correct.

[fol. 134] Q. You tell the Court when you contracted out the big job in 1954, you laid off employees, despite the fact that you had increased from eighteen to twenty-two mechanics from 1952 to 1954, is that correct?

A. Yes, and if you go back a little further you will find that we had fifty-three in 1949.

Q. You had no labor contract at that time?

A. No, not in 1949, not with your union, we had other contracts.

Q. For those particular employees?

A. Not for this particular group, no.

Q. So you didn't have anybody laid off then, you didn't have any policy of laying off workers and allowing them to lose their seniority in 1949, did you?

A. Yes, sir, we have always adhered long before the Union came into the picture to the strict two year seniority system. That was not something new. We had that from the beginning of our operation.

Q. It is fair to say that those employees laid off in 1949 had lost their two years seniority by 1954?

A. That is possible, yes, sir, if their two years had expired.

Q. There are more than two years between 1949 and 1954?

A. Yes. We had fifty-three people in 1949. In 1950, we had thirty-seven. I can show you where we contracted work in 1950, with the lay off of some twenty men.

Q. You had no union contract then, did you?

A. Not with this group. I had other union contracts with other employees.

Q. But you say you had men on lay off?

A. Yes, sir.

Q. You nevertheless contracted out work?

A. Yes, sir.

[fol. 135] Q. Tell the Court what kind of work and to whom you contracted it out?

A. The same type of work performed at our yard, the same type we are discussing here, repairing bottoms of barges, conversion jobs from wooden hatch covers to steel lift off covers, etc.

Q. Now, if you will tell us when you have contracted out that work after the Union has come in, when employees were laid off?

A. You mean when the Union employees were laid off?

Q. Yes?

A. Certainly, in 1956, we had contracted out work when five people were laid off, five Union people; twenty-five in

1955; we had twenty in 1956, in March; during that period we were still contracting out this work.

Q. You had twenty in 1956?

A. Yes, sir, March 1956, we had twenty, people, yes, sir.

Q. You laid off some employees then you say?

A. Yes, in November 1956, we laid off five.

Q. Those employees you laid off in November 1956 are the employees among others who are concerned with this grievance, are they not?

A. I assume they are.

Q. Other than these employees who have filed this grievance, have you ever contracted out this work we are complaining about when you laid off men prior to that time?

A. Yes, sir.

Q. In 1952?

A. Yes, sir.

Q. When other than then?

[fol. 136] A. Every year since 1952 we have been contracting out this type of work.

Q. What I want to know if you will tell me: In 1952, you had eighteen mechanics?

A. That is right.

Q. In March 1954, sir, you had twenty-two mechanics. Now, what I am trying to find out is how you figure anybody was laid off during that period when you were contracting this work out. As I see it, you increased your staff rather than decreased it.

A. In 1952 we had eighteen mechanics.

Q. That is right.

A. During the year 1952, we also contracted out a lot of our repair work, as has always been done, and we have never changed our policy before and after the Union came into the picture of giving out this type of work, that we felt was the most economical thing to do for the company.

Q. If you were not contracting out all the work you can do at your Chickasaw terminal, how many employees would you have to call back?

A. I could not answer that question. I don't know the extent of what those repairs are going to be.

Q. Just the repairs that you have under way right now in various yards, if that work were done by the bargaining unit people at your place of work?

A. I understand we could not call back this crew on a permanent basis.

Q. Has anyone asked you to call them back on a permanent basis?

A. If we tried to do all that work out there, we would have to have all these fellows down there, where we could get our hands on them from day to day. They would have to report in. I told those fellows when we reduced the force [fol. 137] we were going to get this down to the point where we could give regular work to the people we now have. We have learned from sad experience—you will notice from the fluctuation in the number of employees—it is costly to keep laying off people and calling people back. It is unwieldy.

Q. You have work for these people if you call them back, don't you?

A. We could possibly find jobs sporadically.

Q. How many of them could you find jobs for?

A. I could not answer that without a thorough study.

Q. Your best estimate?

A. I would not attempt to estimate it. Sometimes we might need fifty men down there. Let me make this statement. During low order seasons, occasionally we will ground a series of barges—we have had as many as five or six barges at one time—we would have to call in a devil of a gang.

Q. From all that talk, it all boils down to this: There are men who are signatories to the grievance in question who are laid off, who would not be laid off, if you were not contracting out a certain amount of your repair and maintenance work on your equipment?

A. I would not say that. They would be laid off for temporary periods between jobs. It would be a hit and miss proposition, as I said, to bring them down and let them report to see if we had a job. We might work them today and not again for a week.

Q. Did you ever know of them objecting to doing that?

A. No, sir, but we object.

Q. Would that restore their seniority rights, if you called them back for one day.

A. Yes, sir.

[fol. 138] Q. Does that have anything to do with your decision?

A. I testified here at this trial from an economic standpoint.

Q. I ask you this question: Is it fair to say that if you were not contracting out this work that you are contracting out now, that some of these men would be able to come back for at least one day's work?

A. Yes.

Q. That would re-instate their seniority rights or keep their two year period from passing? Would it not?

A. I suppose you are right, according to the terms of the contract.

Q. So the contracting out practice that you are engaging in now, it is fair to say, is causing at least some of those people the jeopardy of losing their seniority rights as employees of Warrior & Gulf Navigation Company?

A. Apparently, that is true.

Redirect examination.

By Mr. Lang:

Q. Referring to the figures you gave on the fluctuating employment, you had a contract with the Union in 1955 and throughout the year 1956, did you not?

A. Yes, sir.

Q. In 1955, you had fifty-five mechanics and thirty-two helpers?

A. I believe that figure was twenty-five mechanics and thirty-two helpers.

Q. In March 1956, you reduced the number of mechanics by five and the number of helpers by ten?

A. That is correct.

[fol. 139] Q. Were you subcontracting repair work out while that reduction was made?

A. Yes, sir.

Q. With reference to the question you were asked about

possibly providing an occasional day's work to laid off employees, you said the company objects to that. On what basis would the company object to doing that?

A. It would increase our cost of doing this work when you have a fluctuating force.

Mr. Black: Objection, on the ground he didn't know any facts about the subject of cost.

Judge Thomas: I think it is all repetition. I think you have gone into it.

Mr. Lang: Exception.

Mr. Lang: One more question: What about the matter of time, in seeking out and recalling laid off employees, for that sporadic work? Does that enter into it?

A. Certainly.

By Mr. Lang (Continuing):

Q. In what respect?

A. Time is the essence in any transportation business such as ours. Looking up those laid off people for a small job would consume time, and, not only that, we have to go through the purchasing department and set up an order for [fol. 140] material and get it on hand, whereas these other shipyards are all ready to do that work on a moment's notice.

Mr. Lang: That is all we have, sir. We Rest.

Judge Thomas: Any rebuttal?

Mr. Black: Yes, sir.

A. Gus Rodriguez, being recalled, testified as follows:

Direct examination.

By Mr. Black:

Q. You are the same Mr. Rodriguez who testified here earlier?

A. Yes, sir.

Q. You heard Mr. McElroy testify that the Union proposed something with reference to contracting out at the

negotiations leading up to the contract, which is the basis of this suit, did you not?

A. That is right.

Q. Do you know what proposal was made to the company, with reference to contracting out?

A. Well, as representative of the United Steel workers, we generally get the proposals that are made by the Wage and Policy Committee to be proposed to the various companies, where we are to represent the employees. Now, we take these proposals—

[fol. 141] Judge Thomas: Let's get down to the question. What happened in this instance?

A. Well, we take the proposals of the United Steelworkers and propose to the company, in trying to protect these employees, that we try to limit this contracting out of work to the extent that we mutually agree on contracting out.

Mr. Black: Was that the general proposal made by the United Steel Workers to the United States Steel Corporation and to all other major steel companies?

A. Yes, sir.

By Mr. Black (Continuing):

Q. Now, did you or anyone else on the Union side ever agree with the company that the company had an unrestricted right to contract out work?

A. Never.

Q. Did you, on the other hand, Mr. Rodriguez, ever claim that the contract restricted the company from contracting out emergency repair work?

A. No, we have not.

Q. Did you ever claim that the contract restricted the company from contracting out work that could not be done at the Chickasaw terminal?

A. Never.

Q. Did the Union ever agree with the company that the company had an unrestricted management right to contract out any repair work?

A. Never.

Q. Did you ever give the company any reason to believe that was so?

A. No, sir.

[fol. 142] Q. Since this contract was entered into in 1956, has the Union complained of the company's practice, with reference to contracting out?

A. Yes, the Union has complained.

Q. Did that start soon after the men were laid off?

Mr. Lang: Objection, as leading.

Mr. Black: Tell us when that started!

Judge Thomas: When did it start?

A. Well, after the 1956 agreement, and subsequent months, a couple of months later some of our fellows were laid off, allegedly for lack of work. Now, I have to be in and out of town quite a bit. It was not until some months later that it was brought to my attention that the Warrior & Gulf Navigation Company was subcontracting some of the work that had been originally done at their yard to some outside companies, and it was reported to me, and I instructed the Committee to go in and talk to management about it, to see if they would not stop the practice.

Q. Did you do that as soon as you learned of the practice?

A. As soon as I found out these people were contracting out work that had been originally being performed by our employees at Warrior & Gulf, in May 1958, there was a special meeting held and there was a committee meeting with Warrior & Gulf Navigation Company, in which the [fol. 143] Committee talked this matter over with Mr. Fulmer, and resolutions of that meeting are recorded in our minute book. The report that was given back to me was that Mr. Fulmer had stated to the Committee that they had entered into a contract with Harrison Brothers to convert some hatch covers on some barges. Now, they claimed that they had entered into this contract prior to the time that those people were laid off, and they didn't want to break that contract and get into trouble with Harrison Brothers. They reported to me that Mr. Fulmer led them to believe—

Mr. Lang: Objection, as hearsay.
Judge Thomas: Sustained.
Mr. Black: Exception.

By Mr. Black (Continuing):

Q. As a result of that conference, did the men come back and report to you?
A. Yes.
Q. As a result of your conversation with the men, did you stop action temporarily with reference to the contracting out?
A. Yes, I did.

Cross examination.

By Mr. Lang:

Q. Mr. Rodriguez, how long have you been connected with the United Steelworkers of America?
[fol. 144] A. Since May, 1953.
Q. How many grievances have you filed in that period of time?
A. With Warrior & Gulf Navigation Company?
Q. With all companies?
A. I cannot give you the exact figure.
Q. Would it be in the hundreds?
A. Possibly.
Q. Are you bashful about filing grievances?
A. Me?
Q. Yes, sir.
A. I file them only when they are warranted.
Q. You didn't feel there was any warrant for filing this grievance until August 1958?
A. Well, I can only do what the membership requests me to do. I don't dictate. I serve these people as a representative.
Q. The membership didn't request you to file a grievance until August 22nd, 1958, is that correct?
A. That is correct.
Q. Now, as I understand this proposal, which you say you submitted to the company in the 1956 negotiations, you

didn't ask that the company stop subcontracting. You asked merely that the company agree that it not subcontract unless you gave your permission. Is that correct?

A. Well, the proposal was that we try to protect the interest of our people, to try to limit the contracting out work as much as we can.

Q. My question is: you merely asked that the company agree that it not do any further subcontracting unless it was permitted by the committee?

A. Unless there was mutual agreement.

[fol. 145] Q. What is the difference between that and the company agreeing not to subcontract unless you gave your permission?

A. We try to limit these subcontracts as much as we can, and try to protect the interest of our people.

Q. In other words, your objective was to keep the company from doing any further subcontracting?

A. As much as we could.

Q. You abandoned that proposal, did you not?

A. Yes.

Q. The contract was signed without limitation or any such restriction in it?

A. That is right.

Q. You took it that the company still had the right to keep on subcontracting?

A. No.

Q. Where did the company abandon the right to subcontract?

A. I think, if the Judge will permit, I want to refer you to the management clause and also to the provisions in the grievance procedure. You referred to the second sentence in the first paragraph and said there are certain matters strictly company prerogatives that cannot be arbitrated. You didn't read the rest of it, where it said that any local matter could be arbitrated. In the management clause, you also read that there were certain provisions in there that were the exclusive rights of management, including the right to fire or lay off, due to lack of work, but you failed to finish it by saying there is a proviso that it limits you there, to the extent that you do not use those to discriminate against your employees.

Q. Are you saying that the contract provides that subcontracting is a local matter which may be arbitrated?

[fol. 146] Mr. Black: Objection. He is arguing with the witness.

Mr. Lang: I think it is quite pertinent and not argument.

Judge Thomas: I think the contract speaks for itself. I am the one who is going to have to interpret the contract.

Mr. Lang: Exception.

By Mr. Lang (Continuing):

Q. This question may be out of order, but I would like to ask it. Do you feel that under the provision that local matters should be arbitrated that subcontracting was one of those matters that should be arbitrated?

Mr. Black: Objection.

Judge Thomas: Sustained.

Mr. Lang: Exception.

Mr. Lang: Why were you anxious to obtain a provision in the contract which gave you the right to tell the company when it could subcontract?

[fol. 147] Mr. Black: Objection, as argument.

Judge Thomas: Sustained.

Mr. Lang: Exception.

Mr. Lang: That is all.

Judge Thomas: Is there any further testimony?

Mr. Black: No further testimony.

Judge Thomas: Do you gentlemen want to submit with argument, without argument or what?

Mr. Black: Whatever your pleasure is.

Mr. Lang: I would like to submit without argument.

Judge Thomas: I don't want any brief.

Mr. Lang: Except I would like to say that if, as I understand it, Your Honor is going to rule on the whole matter and not on the preliminary injunction.

[fol. 148] Judge Thomas: That is right. I will take it under submission, gentlemen. I will rule on it just as quickly as I can get to it. I am conscious of the fact that it is an injunction matter, which takes precedence. I will

get to it just as quickly as I possibly can. The Court stands in recess.

Filed Jan. 12, 1959.

IN UNITED STATES DISTRICT COURT

ORDER RESERVING RULING ON DEFENDANT'S MOTION TO DISMISS COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION —October 30, 1958

This cause comes on to be heard on the Defendant's motion, filed on October 27th, 1958, to dismiss the Plaintiff's complaint and the motion for a preliminary injunction.

Arguments are heard and,

Thereupon the Court reserved its ruling thereon.

Made at Mobile, Alabama, this the 30th day of October A. D., 1958.

Daniel H. Thomas, United States District Judge.

[File endorsement omitted]

[fol. 149]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Civil Action No. 2100

UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association, Plaintiff,

vs.

WARRIOR & GULF NAVIGATION COMPANY, a corporation, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER— December 22, 1958

The above entitled cause came on to be heard upon motion for preliminary injunction under Section 301 of the

Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185, based upon plaintiff's complaint to compel defendant to arbitrate, under a labor contract, whether defendant has the right to contract out, or subcontract, maintenance work. The plaintiff's motion for preliminary injunction was set down for hearing on October 30, 1958, prior to which defendant filed in opposition to the motion for preliminary injunction, a motion to dismiss, and answer to the complaint. At the hearing on that day counsel for the parties stipulated that all pleadings and matters presented by them be consolidated, tried, and disposed of at one and the same time, and that testimony and other evidence be presented as if on final hearing for a permanent injunction as well as the preliminary injunction. The Court on the same day, after hearing arguments by opposing counsel, and after duly considering same, reserved ruling on defendant's motion to dismiss the complaint and on the plaintiff's motion for preliminary injunction, and denied an oral motion by plaintiff to strike the [fol. 150] Second, Third and Fourth defenses of the defendant's answer. Testimony and exhibits were presented by the parties, with opportunity for cross-examination, after which the matter was on the same day submitted to the Court. The Court, having duly considered the arguments, citations of legal authorities, pleadings and evidence of the parties submitted herein, and being fully advised in the premises and after due and full consideration, now makes the following:

Findings of Fact.

1. The plaintiff, United Steelworkers of America, AFL-CIO, is an unincorporated labor organization within the meaning of Section 2 (paragraph 5) of the National Labor Relations Act, 61 Stat. 137, 29 U.S.C. 152, and Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185. The plaintiff is engaged in representing employee members in collective bargaining with employers who are employed in the steel industry, including the defendant, Warrior & Gulf Navigation Company, a corporation having its principal place of business at Chickasaw, Alabama, within this District and engaged in transporting

steel products through several Southern states as a contract carrier regulated by the Interstate Commerce Commission. The aforesaid activities of the plaintiff and the defendant affect commerce within the meaning of the statute above cited.

2. The plaintiff and the defendant are parties to a contract covering the maintenance employees, among others, at the Chickasaw terminal, dated September 25, 1956, and effective until midnight September 25, 1959, the pertinent portions of which read as follows:

[fol. 151] Section 10.

Adjustment of Grievances.

Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

A. For Maintenance Employees:

First, between the aggrieved employees, and the Foreman involved;

Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic;

Third, between a member or members of the Grievance Committee and at the option of such committee a representative of the National Organization of the Union, and the Vice President;

Fourth, between the representatives of the National Organization of the Union and the representatives of the Executives of the Company; and,

[fol. 152] Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Company and the Union.

Section 11.

Management.

The management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union.

3. On August 22, 1958, a number of employees signed a grievance which was presented to the defendant by the plaintiff and which read as follows:

We are hereby protesting the Company's actions, of arbitrarily and unreasonably contracting out work to other concerns, that could and previously has been performed by Company employees.

[fol. 153] This practice becomes unreasonable, unjust and discriminatory in lieu of the fact that at present there are a number of employees that have been laid off for about 1 and ½ years or more for allegedly lack of work.

Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lockout, of a number of the employees who would otherwise be working were it not for this unfair practice.

4. The plaintiff has not suggested that there is any provision in the labor contract which supports this grievance, and there is in fact no provision in said labor contract on which it may be grounded. Plaintiff contends

that the language in Section 10 of the contract is broad enough to require that this dispute be submitted to arbitration; it asserts that the Court has the duty of determining whether there is any issue to be arbitrated.

5. The defendant was first organized in 1940, and, as an incident to its transportation business, maintains and operates a repair and maintenance yard at its main terminal at Chickasaw, Alabama.

6. The defendant has contracted out construction, repair and maintenance work practically since the inception of its business; it first signed a labor contract with the plaintiff several years prior to the present one.

7. The defendant has contracted out such repair, maintenance and construction work solely for reasons of econ-
[fol. 154] omy and efficiency.

8. Throughout the successive labor agreements between these parties, including the present one, the plaintiff has demonstrated that it was and has been aware of the defendant's practice of contracting out such work, and it has unsuccessfully sought to negotiate changes in the labor contracts, and particularly during the negotiation of the present labor agreement, in the year 1956, which would have limited the right of the defendant to continue the practice of contracting out such work.

9. None of the contracts between the parties affecting the employees involved here has ever contained any provision limiting or abridging in any manner the defendant's right to contract out work of any kind, nor has there been any complaint or grievance at any time prior to August 22, 1958, that any of the labor contracts between the parties in any way limited or abridged the right of the defendant to contract out maintenance or repair work.

10. The Court has read the labor contract carefully and is unable to find in it any provision which could be interpreted to mean that the defendant has surrendered its managerial right to contract out work, or whereby the defendant has agreed to confide in an arbitrator the right to review the defendant's business judgment in contracting out work.

11. On the other hand, the labor contract expressly recognizes the existence of, and reserves to the sole judgment of defendant, matters which are strictly a function of management; and the labor contract expressly prohibits [fol. 155] arbitration of matters which are strictly a function of management. The Court finds that the contracting out of repair and maintenance work, as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here.

12. The defendant has five different contracts with labor organizations, three of them with the plaintiff (one at Port Birmingham, Alabama, covering employees of the defendant there; the second, which is the one here involved, covering the employees at the terminal at Chickasaw, Alabama; and the third covering the deck hands and other unlicensed personnel aboard all of defendant's vessels); the other two labor contracts of defendant are with the Marine Engineers Beneficial Association covering the engineroom personnel aboard its vessels, and with the Master, Mates, and Pilots Union covering the wheelhouse employees aboard its vessels.

13. There has been no showing by the plaintiff that the defendant has engaged in or, insofar as these proceedings are concerned, could be adjudged to have engaged in any conduct which has violated any of the provisions of the present labor contract.

Conclusions of Law.

Upon the foregoing findings of fact the Court concludes.

1. The Court has jurisdiction over the parties and the subject matter under Section 301 of the Labor Management [fol. 156] Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185.

2. The parties are properly before the Court.

3. The issue presented is whether the defendant can be compelled to arbitrate the grievance protesting the contracting out of work.

4. The labor contract does not prohibit, and is not susceptible of being interpreted to require that defendant is prohibited from contracting out work.

5. The labor contract does not give the plaintiff or any of its members or any of the employees of the defendant the right to have arbitrated the question of whether the defendant may contract out work.

6. The right to contract out work is an inherent, traditional right of management which may not be questioned or subjected to arbitration in the absence of agreement on the part of the defendant or an express limitation thereof set forth in the labor contract.

7. The Court has considered the specific contention that Section 10 requires arbitration "should any local trouble of any kind arise," and finds from examination of the remainder of Section 10, of Section 11, of the contract as a whole, the evidence and the arguments of the parties, that this language cannot be interpreted to limit the right of the defendant to contract out work.

8. Defendant may not be required to arbitrate the grievance, and consequently defendant may not be re-
[fol. 157] strained from refusing to arbitrate said grievance since plaintiff has no right to arbitration of the grievance under the labor contract.

ORDER.

An order shall be and it is hereby entered denying the motion for a preliminary and permanent injunction and dismissing the complaint.

It Is, Therefore, Ordered by the Court that this cause be and the same hereby is, Dismissed, with costs taxed against plaintiff.

Made at Mobile, Alabama, this 22nd day of December, A.D., 1958.

Daniel H. Thomas, United States District Judge.

[File endorsement omitted]

[fol. 158]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Civil Action No. 2100

UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association, Plaintiff,

vs.

WARRIOR & GULF NAVIGATION COMPANY, a corporation, Defendant.

NOTICE OF APPEAL TO FIFTH CIRCUIT COURT OF APPEALS UNDER RULE 73(b)—Filed January 8, 1959

Notice is hereby given that United Steelworkers of America, AFL-CIO, an unincorporated association, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Findings, Conclusions and Order entered herein by United States District Judge Daniel H. Thomas on December 22, 1958.

This the 8th day of January, 1959.

Cooper, Mitch, Black & Crawford, Attorneys for United Steelworkers of America, AFL-CIO, By Hugo L. Black, Jr., 1329 Brown-Marx Building, Birmingham 3, Alabama.

[File endorsement omitted]

[fol. 159] Cost Bond on Appeal for $250.00—Filed January 8, 1959 (omitted in printing).

[fol. 164] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 165] MINUTE ENTRY OF ARGUMENT AND SUBMISSION —June 2, 1959 (omitted in printing).

[fol. 166]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17646

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Appellant,

versus

WARRIOR & GULF NAVIGATION COMPANY, Appellee.

Appeal from the United States District Court for the Southern District of Alabama.

Before Hutcheson, Chief Judge, and Rives and Tuttle, Circuit Judges.

OPINION—July 30, 1959

Tuttle, Circuit Judge: This is an appeal from a denial by the trial court of an order granting specific performance of an agreement to arbitrate. The action was brought by the appellant, United Steelworkers of America, AFL-CIO, against the appellee, Warrior & Gulf Navigation Company, under Section 301 of the Labor Management Relations [fol. 167] Act, 29 U.S.C.A. §185. The sole question presented by the suit is whether, under the terms of the collective bargaining agreement between the parties, unilateral action by the employer in contracting out work that had previously been performed by members of the bargaining unit gave rise to a dispute which is subject to arbitration. The district court held that it did not, and, accordingly, dismissed the Union's complaint.

The employer is engaged in the transportation by barge of steel products and raw materials used in the manufacture of steel. It maintains a terminal at which it performs

certain repair and maintenance work on its barges. During the term of the current collective bargaining agreement the company undertook to contract with others to perform some of this maintenance work. This resulted in the filing of a grievance by the union which averred as follows:

> "Nature of Grievance. We are hereby protesting the Company's actions, of arbitrarily and unreasonably contracting out work to other concerns, that could and previously has been performed by Company employees.
>
> "This practice becomes unreasonable, unjust and discriminatory in view of the fact that at present there are a number of employees that have been laid off for about 1½ years or more for allegedly lack of work.
>
> "Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lock-out of a number of employees who would [fol. 168] otherwise be working were it not for the unfair practice."

The Company took the position, which it adhered to in the suit below, that the matters dealt with in the grievance were not subject to grievance procedures. These grievance procedures are provided for by Section 10 of the collective bargaining agreement, the first paragraph of which follows:

> "Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section."

This language is immediately followed by a second introductory paragraph upon which the appellant places major reliance. It provides:

> "Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind

arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner: . . ."

In bringing its suit for specific performance of an agreement to arbitrate the appellant must, of course, show that the collective bargaining agreement places on appellee the duty to arbitrate. *Local No. 149* v. *General Electric Co.*, 1 Cir., 250 F. 2d 922, 927. The initial determination whether [fol. 169] such duty arises under the contract must be made by the court. *Local No. 149* v. *General Electric Co., supra; Engineers Association* v. *Sperry Gyroscope Co.*, 2 Cir., 251 F. 2d 133, 137. Since an agreement relating to the processing of grievances, including compulsory arbitration, may appropriately be dealt with by the parties as they see fit, it is of course within the competence of the Union and the employer to limit the subject matter of such grievance procedures. Here the parties introduced the section dealing with grievances by an initial withdrawal from the provisions of the section of any matters "which are strictly a function of management." We have heretofore in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Greyhound Corporation*, 5 Cir., 231 F. 2d 585, stated that whatever subjects are not covered by an employment contract are left to the parties to act upon as they see fit. The contract before us does not deal with the power of the employer to contract with others to perform services previously done by its employees. Since this is a matter as to which an employer may, except as limited by a specific collective bargaining agreement, act without violating either state or federal law, it remains, so far as relates to this agreement, strictly a matter of management. Even if this result did not follow from the fact that the contract does not restrict such action, it would nevertheless follow by reason of the construction of this collective bargaining agreement in the light of the conduct of the parties in negotiating it. [fol. 170] The trial court, upon ample evidence, made the following findings of fact:

"8. Throughout the successive labor agreements between these parties, including the present one, the plaintiff has demonstrated that it was and has been aware of the defendant's practice of contracting out such work, and it has unsuccessfully sought to negotiate changes in the labor contracts, and particularly during the negotiation of the present labor agreement in the year 1956, which would have limited the right of the defendant to continue the practice of contracting out such work.

"9. None of the contracts between the parties affecting the employees involved here has ever contained any provision limiting or abridging in any manner the defendant's right to contract out work of any kind, nor has there been any complaint of grievance at any time prior to August 22, 1958, that any of the labor contracts between the parties in any way limited or abridged the right of the defendant to contract out maintenance or repair work." 168 F.Supp. 702, 704-5 (1958).

Thus, what we have here is a collective bargaining agreement resulting from negotiations between the parties, one of which sought to include a provision prohibiting the company from contracting out some of its work. Having failed at the conference table to obtain the consent of the other party to the inclusion of such provision, it signed the contract that was finally worked out, presumably by a process of "give and take" between the parties. It is not [fol. 171] only consistent with basic principles governing the construction of a contract for the court, as it did, to hold that the final product should not be construed to give the Union the provision it had unsuccessfully sought to have incorporated, but it would be unconscionable for the court to hold to the contrary. Whatever may be meant ordinarily by the term "inherent rights of management," (Cf. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Greyhound Corporation, supra*) we clearly have here a matter which by the agreement of the parties, is "strictly a matter of management."

Having decided that the criticized action of the Company is action which by the agreement of the parties was not to be a subject of arbitration, we conclude that the trial court correctly decided that the action for specific performance must fail. See *Local No. 149* v. *General Electric Co.*, 1 Cir., 250 F. 2d 922; *United Steel Workers of America* v. *American Manufacturing Co.*, 6 Cir., 36 CCH, Lab. Cas. ¶65,300.

The appellant attempts, by characterizing the simple facts of contracting out maintenance work as "unreasonable, unjust and discriminatory," and by asserting such conduct by the Company amounts to "inducing a partial lockout," to set the complaint within a frame of reference comprehended by the agreement to arbitrate. This, however, cannot change the fact that the criticized action, by whatever name called, remains exempted from the range of arbitration. Moreover, it is plain that characterizing this action as "discriminatory" is not sufficient to bring it [fol. 172] within the prohibition of the contract which forbids "discrimination against any member of the Union." This is so because there is no discrimination charged in the grievance except that the contracting out occurred at a time when there "are a number of employees that have laid off for about 1½ years or more allegedly because of lack of work." Nor does the characterization of the Company's action as "a partial lockout" bring it within the language of the section making a "lockout on the part of the Company" a violation of the agreement. Any contention that such action as is here criticized amounts to what is known in labor-management relations as a "lockout" is clearly a simple play on words and is insubstantial.

The judgment is Affirmed.

RIVES, Circuit Judge, dissenting:

Originally of like view with my brothers and the learned district judge, further study and reflection have brought me to the certain conclusion that this judgment should be reversed.

The union's grievance as stated by a group of laboring men need not meet the technically precise requirements

of strict pleadings. As quoted in the majority opinion, it clearly states: first, that the employer has engaged in the practice of subcontracting to such an extent that, under the conditions currently prevailing, the practice amounts to a partial lockout in violation of the express terms of the [fol. 173] collective bargaining contract; and, secondly, that the employer has engaged in this practice for the purpose of discriminating against members of the union, again in violation of the express terms of the contract.[1]

In order to determine the arbitrability of this grievance, reference must be made to Section 10 of the contract, which provides, in pertinent part, as follows:

"Adjustment of Grievances

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner . . ."

Section 10 then proceeds to outline a five-step grievance procedure culminating in arbitration by an impartial umpire selected by the parties.

[fol. 174] The decision in this case ultimately turns upon the interpretation given to the above-quoted provisions of Section 10. The employer, on the one hand, contends: that the first paragraph of Section 10 creates an overriding exclusion from the general arbitration provisions that

[1] In its brief, the union also suggests that the grievance is premised upon the theory that the employer's actions are in violation of the purpose, recognition, wages, and seniority clauses of the contract. Such allegations do not, however, raise a different theory for these clauses are ultimately dependent for their content upon the discrimination and lockout clauses.

follow; that this exclusion is for judicial cognizance rather than merely a direction of the arbitrator; and that the matter of subcontracting falls entirely within this exclusion in that it is "strictly a function of management." The union, on the other hand, joins issue on each of these points, contending: first, that no overriding exclusion from the general arbitration provisions is created; secondly, that, even if such an exclusion were created, the context renders it clear that the exclusion is no more than a direction to the arbitrator; and, finally, that, in any case, the matter of subcontracting without any restrictions is not "strictly a function of management," but, rather, is limited by other provisions of the agreement. I agree with the contention of the union on this third point, and hence do not reach the first two.[2]

Insofar as the union's grievance is premised upon the theory of a partial lockout, the controlling section of the agreement, in my view, is Section 3, which provides:

"Illegal Suspension of Work

"A strike or stoppage of work on the part of the employees represented by the parties signatory hereto [fol. 175] shall be a violation of this Agreement, and there shall be no strikes, work stoppages, interruptions, or impeding of work. Likewise, a lockout on the part of the Company shall also be a violation of this Agreement."

This blanket prohibition of strikes and lockouts is nowhere qualified in the Agreement. On the contrary, the entire tenor of the Agreement is that the parties are seeking complete stability. By Section 3 the employer has unreservedly relinquished any managerial prerogative it might have had to resort to a lockout and, at the same time, it has subordinated any retained management functions to the overiding qualification that they not be exer-

[2] With respect to the questions raised concerning the first paragraph of Section 10, appellant's observation that "this can hardly be said to be a model of contractual draftsmanship" seems well taken.

cised to effect a lockout. Any other construction would render nugatory the express provisions of Section 3.[3]

It therefore seems clear that, if the charges contained in the union's grievance of August 22 are true, the actions of the employer in subcontracting work are in violation of Section 3 of the contract. The essential question then is whether the contract contemplates the determination of these charges by arbitration. When attention is directed to the nature of the issues raised by the charges, it is clear that this question must be answered affirmatively.

In the first place, the contract provides for the arbitration of "differences . . . as to the meaning and appli- [fol. 176] cation of the provisions of this Agreement." Clearly, such differences are involved here. The dispute turns upon the meaning and application of the term "lockout" as it appears in Section 3. Moreover, the contract provides for the arbitration of "any local trouble of any kind." A dispute as to the existence of a partial lockout would seem to be equally well covered by this provision.[4]

The decision of the district court below was premised upon acceptance of the employer's contention that subcontracting is "strictly a function of management" under the terms of the contract, and, therefore, disputes in reference thereto are expressly excluded from the scope of the arbitration provisions by the first paragraph of Section 10 of the Agreement.

Such a premise does not, however, withstand close examination. The management functions clause itself in the contract certainly does not sustain it. That clause provides only that

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[3] It cannot be said of the present arbitration clause as was said in Refinery Employees Union vs. Continental Oil Co., 5th Cir. No. 17344, decided June 24, 1959: "The arbitration clause in the case at bar is not a broad grant of authority to the arbitrators, a *quick pro quo* for giving up the right to strike."

[4] See Timken Roller Bearing Co. v. N.L.R.B., 6th Cir. 1947, 161 F.2d 949, wherein the Court of Appeals for the Sixth Circuit took a similar view of an identical arbitration provision.

"[t]he management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union."

[fol. 177] The employer has sought to avoid the implications of the absence of any express provision for the retention of the matter of subcontracting as a management function by reliance upon evidence which it contends establishes a practical construction of the contract to that effect, and which is summarized in the district court's findings of fact numbered 8 and 9, quoted in the majority opinion. Though those findings are amply supported by the evidence in the record, they are of no avail to the employer here. This is so because they fall entirely short of justifying the conclusion that unrestricted subcontracting in violation of other provisions of the collective bargaining agreement cannot give rise to an arbitrable grievance.

At the very most, these findings establish only that subcontracting is not, in itself, a violation of the contract and that the practice of subcontracting as it was engaged in by the employer during the earlier years of the relationship between the parties did not involve a breach of any other provisions of the contract. Quite obviously, these propositions do not dispose of the issues of this case. Since the allegation of a partial lockout is based upon *currently prevailing conditions*, the history of the relationship between the parties is in no way inconsistent with the union's present contention.[5] To borrow the words of a

[5] To hold otherwise would be to completely ignore the difference between a contract which limited or absolutely prohibited subcontracting and one which merely subordinated the employer's right to subcontract to the more general obligations imposed upon him by the collective bargaining contract, such as the obligation not to lockout and the obligation not to discriminate. The union's attempt to obtain a contract which would fall into the first of these categories certainly does not constitute an admission that the existing contract did not already fall into the second. Insofar as

[fol. 178] well-known labor arbitrator—"The . . . issue . . . is not whether the Company may contract out *all* of its work or *none* of its work. It is whether there was any implied contractual bar to the contracting out of *this particular . . . work . . . under the circumstances of this particular case.*"[6]

Insofar as the union's grievance is premised upon the theory that the employer has utilized the practice of subcontracting to discriminate against the members of the union, the case is even stronger. Section 11 of the contract *expressly* subordinates all management functions to the overriding limitation that they "not be used for purposes of discrimination against any members of the Union." Thus, "matters which are strictly a function of management," as that term is used in Section 10 of the contract, can never be interpreted to include disputes involving allegations of discrimination. To do so would involve ignoring express limitations in the management functions clause itself.[7]

Finding of Fact No. 11 of the district court (168 F.Supp. 702, 705) is at variance with these views, it is incorrect.

[6] Ralph T. Seward, *Bethlehem Steel Co.*, 30 LA 678. (Emphasis in original.)

[7] The interpretation given here to the term "strictly a function of management" cannot be objected to on the ground that it completely destroys the meaning of that clause. On the contrary, the clause is not without meaning, for it operates to preclude from arbitration any dispute as to the propriety of the exercise of a management function which does not involve a violation of other substantive provisions of the contract. For example, the employer need not arbitrate a dispute concerning his power to discharge for proper cause. If, on the other hand, the dispute involves an allegation that no proper cause for the discharge existed, or that the discharge was motivated by discriminatory purposes, the contract requires reference of the dispute to arbitration.

Similarly, the employer is under no obligation to arbitrate a dispute concerning his power to subcontract. But where, as here, the allegation is that this power has been utilized to violate other provisions of the contract, the duty to arbitrate arises.

Thus, the term "strictly a function of management" is interpreted to mean a function of management, the exercise of which does not involve a violation of any of the other provisions of the contract. Indeed, it is difficult to see how the word "strictly" could have any other meaning.

[fol. 179] In its Findings of Fact, the district court concluded that:

"7. The defendant has contracted out such repair, maintenance and construction work solely for reasons of economy and efficiency.

* * * * * * *

"13. There has been no showing by the plaintiff that the defendant has engaged in or, insofar as these proceedings are concerned, could be adjudged to have engaged in any conduct which has violated any of the provisions of the present labor contract." 168 F.Supp. 702, 704, 705.

Without expressing any opinion as to the correctness of these findings, they are without effect upon the course of this litigation. They involve a determination of the merits of the union's grievance, and, consequently, constitute an invasion of the province of the arbitrator as defined in the contract between the parties.[*]

[fol. 180] I think that the judgment should be reversed, and therefore respectfully dissent.

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[*] We are not here confronted with the necessity of determining whether this Court will adopt the so-called *Cutler-Hammer* doctrine. See *International Association of Machinists v. Cutler-Hammer, Inc.*, 271 App.Div. 917, 67 N.Y.S.2d 317 (Sup.Ct., 1947), aff'd without opinion 297 N.Y. 519, 74 N.E.2d 464 (1947). Under this doctrine, some courts have refused to order arbitration of a dispute otherwise clearly arbitrable on the ground that the plaintiff's grievance was so clearly without merit that no substantial question for arbitration was raised. See, *e.g.*, *United Steelworkers of America v. American Manufacturing Co.*, 43 LRRM 2757 (6th Cir. 1959). But see Judge Magruder's opinion in *New Bedford Defense Products Division v. Local 1113, U.A.W.*, 1st Cir. 1958, 258 F.2d 522, 526-27. Without taking any view on the merits of this doctrine, I would hold that the grievance here sought to be arbitrated is not so lacking in substance as to fall within its ambit. The dispute is therefore arbitrable under the principles enunciated by this Court in *Lodge No. 1, etc. v. Cameron Iron Works*, 1958, 257 F.2d 467, 471.

[fol. 181]

IN UNITED STATES COURT OF APPEALS

No. 17646

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

versus

WARRIOR & GULF NAVIGATION COMPANY.

JUDGMENT—July 30, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, United Steelworkers of America, AFL-CIO, and the surety on the appeal bond herein, National Surety Corporation, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

[fol. 182] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 183]

SUPREME COURT OF THE UNITED STATES

No. 443, October Term, 1959

UNITED STEELWORKERS OF AMERICA, Petitioner,

vs.

WARRIOR & GULF NAVIGATION COMPANY.

ORDER ALLOWING CERTIORARI—December 7, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is set for argument immediately following No. 360.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration or decision of this application.

FILE COPY

No. 443

FILED
SEP 30 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

WARRIOR & GULF NAVIGATION COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

WARRIOR & GULF NAVIGATION COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 30, 1959.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court are reported at 168 F. Supp. 702. The opinion of the Court of Appeals is not yet reported. Both are reproduced in the Appendices to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1959. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

In an action under Section 301(a) of the Labor Management Relations Act to compel arbitration pursuant to a collective bargaining agreement which provides for the arbi-

tration of "differences . . . as to the meaning and application of the provisions of this Agreement, or . . . any local trouble of any kind":

1. Is it proper for the court either:
   (a) to determine whether the union's contention in support of the grievance which it seeks to arbitrate is substantial or not, and to refuse to order arbitration when, in its view, the grievance is "insubstantial," or
   (b) To construe the substantive provisions of the collective bargaining agreement and to determine, as a condition precedent to ordering arbitration, whether the management action complained of violates any provisions of the agreement?
2. Does a provision stating that "Issues which conflict with any Federal statute in its application as established by court procedure or matters which are strictly a function of management shall not be subject to arbitration" require a court to determine, as a condition to ordering arbitration of a grievance based on provisions of the agreement other than the management clause, whether the company, in performing its management functions, has violated those other provisions?
3. If a court may make the determinations set forth above, were the courts below correct in determining from the evidence in the present case that under the agreement no grievance protesting the contracting out of work covered by the collective agreements could possibly be arbitrable?

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or

between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Respondent Warrior & Gulf Navigation Company (hereinafter called "Warrior & Gulf" or "Company") is a subsidiary of the United States Steel Corporation engaged in the transportation by barge of steel products and raw materials used in the manufacture of steel (R. 91). It maintains a terminal at Chicasaw, Alabama, at which it performs certain repair and maintenance work on its barges. The maintenance employees and barge men employed at the terminal constitute a collective bargaining unit and are covered by an agreement between Warrior & Gulf and Petitioner, United Steelworkers of America, AFL-CIO, a labor organization, (hereinafter called "Steelworkers Union" or "Union"). This agreement (R. 7-29) specifies the wages, hours and working conditions of the employees at the terminal and contains both an absolute prohibition against strikes and lockouts (R. 8) and, in Section 10, a procedure for the settlement of disputes during the term of the agreement (R. 21).

Section 10 provides, in pertinent part, as follows:

"ADJUSTMENT OF GRIEVANCES

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account

of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner:

"A. For Maintenance Employees:

"First, between the aggrieved employees, and the Foreman involved;

* * * *

"Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Company and the Union."

In August, 1958, the Union filed a grievance under this procedure, alleging that Warrior & Gulf had violated the collective bargaining agreement by its course of action in laying off employees in the bargaining unit while contracting their work out to other employers. (R. 152-53).

As shown at the trial of this case, the grievance was based on the claim that, between March of 1956 and December of 1958, Warrior & Gulf had almost halved the bargaining unit from 42 men to 23 men by greatly increasing the amount of maintenance work (which these employees could perform and had performed in the past) contracted to other companies.[1] These contracting companies used Warrior &

[1] Between March and November of 1956, Warrior & Gulf laid off 5 Mechanics and 5 Helpers (R. 92); between November of 1956 and January of 1957, Warrior & Gulf laid off 4 more Mechanics and 4 more Helpers making a total of 9 Mechanics and 9 Helpers laid off to Januar of 1957 (R. 93); between January of 1957, and the October date of trial, 3 more Mechanics quit and 2 retired, and no one was recalled (R. 93), which left a total of 23 employees remaining or a total payroll shrinkage of 14 Mechanics and 5 Helpers or 19 less

Gulf supervisors to lay out the Warrior & Gulf work (R. 56, 57; 65, 66); hired some of the laid-off Warrior & Gulf employees for less than the rate called for in the Warrior & Gulf contract with the Steelworkers Union (R. 58); and, indeed, assigned some of the laid-off Warrior & Gulf employees to the Warrior & Gulf work in their yards. (R. 56; 65). It was the theory of the Union that this action constituted a partial lockout (R. 153) and a violation of the seniority provisions of the agreement (R. 3, 73-74), as well as a violation of the provision specifying the wages to be paid for this work (R. 82).[2]

The grievance was processed through the preliminary steps of the grievance procedure without resolution. The Union then requested that the grievance be submitted to arbitration, as provided for in the agreement. Warrior & Gulf refused (R. 2-3, 53). The Union then filed this suit under Section 301 of the Labor Management Relations Act,

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bargaining unit employees from March of 1956 to the date of the trial. (R. 93, 94)

Meanwhile, during the time the repair force was being reduced, the contracting out of maintenance work almost doubled. In 1955, the Company contracted out $33,940.00 of repair work (R. 103); in 1958, the Company had contracted out $48,000.00 of repair work through September, which on a projected basis to the end of 1958, would be $64,000.00, or almost double the 1955 figure. (R. 128)

Warrior & Gulf supervisors continued to lay out the Warrior & Gulf work done by the subcontractors. There was no reduction in the number of supervisory or clerical employees (R. 69, 70) during the period when the bargaining unit was being reduced and additional work was being contracted out.

[2] The grievance itself (R. 152-153) did not specify the precise contractual theory relied on in support of the claim of contract violation. Grievances, being drawn by workingmen and not by lawyers, very often fail to do so. Indeed, one of the purposes of a grievance procedure providing for discussions at ascending levels of union and company responsibility is to explore and refine the issues before a case is taken to arbitration. To treat the grievance filed by the employees in the first step as defining the contractual issues sought to be arbitrated, as all members of the Court of Appeals did here, is plainly erroneous.

1947, 29 U.S.C. §185, to compel the Company to comply with its agreement to arbitrate the grievance (R. 1-5).

The Union filed a motion for preliminary injunction (R. 30), and the defendant filed a motion to dismiss for failure to state a claim (R. 35) and an answer (R. 44). When the motion for preliminary injunction came on for hearing all parties agreed to dispose of the entire matter at that hearing (R. 49).

The District Court overruled the Union's motion to strike the defenses, stated in the Company's answer, which went to the merits of the grievance, rather than its arbitrability (R. 51-52). After hearing the evidence, substantially all of which in fact went to the merits of the grievance, the district court made findings of fact and conclusions of law; granted Warrior & Gulf's motion to dismiss the complaint; and denied the Steelworkers' Union's motion for a preliminary and permanent injunction (R. 149-157). The district court found as a fact that the Union had not shown that the Company "engaged in any conduct which has violated any of the provisions of the present labor contract." (Finding of Fact 13, R. 155). It concluded as a matter of law, in substance, that the Union's grievance was not well founded. This conclusion was expressed in the following language (R. 156, App. A, p. 6-7).

> "4. The labor contract does not prohibit, and is not susceptible of being interpreted to require that defendant is prohibited from contracting out work.
>
> "5. The labor contract does not give the plaintiff or any of its members or any of the employees of the defendant the right to have arbitrated the question of whether the defendant may contract out work.
>
> "6. The right to contract out work is an inherent, traditional right of management which may not be questioned or subjected to arbitration in the absence of agreement on the part of the defendant or an express limitation thereof set forth in the labor contract.

"7. The Court has considered the specific contention that Section 10 requires arbitration 'should any local trouble of any kind arise,' and finds from examination of the remainder of Section 10, of Section 11, of the contract as a whole, the evidence and the arguments of the parties, that this language cannot be interpreted to limit the right of the defendant to contract out work."

The Court of Appeals for the Fifth Circuit affirmed, Judge Rives dissenting. The majority first noted that the agreement withdrew from the section dealing with grievances any matters "which are strictly a function of management." Interpreting the agreement before it, the majority then concluded that the grievance concerned a subject which was strictly a "matter of management" because the agreement did not limit the power of the employer to contract with others to perform services previously done by its employees. (App. B, p. 3-4.)

This conclusion, the court said, rested on two grounds. First, all subjects not specifically covered by the collective agreement remain matters of management. (App. B, p. 3-4.) Second, the Union in this case actually had sought to negotiate in 1956 a clause dealing with subcontracting. Under those circumstances it would be inconsistent "with basic principles governing the construction of a contract" for a court to construe it to give the Union the provision it unsuccessfully sought to have incorporated. (App. B, p. 4-5.)

The statements in the grievance that the Company's actions were "discriminatory" and constituted a "partial lockout" were not sufficient to bring the grievance into the "range of arbitration," the court said, since the actions complained of, by whatever name called, were exempted from arbitration. Any contention that they constituted a violation of the contractual provision against discrimination against members of the Union or of the provision prohibiting lockouts was "insubstantial." (App. B, p. 5-6.)

Judge Rives, dissenting, limited himself to the "partial lockout" and "discrimination" contentions set forth in the grievance, although he noted that the grievance need not meet the precise requirements of strict pleadings. (App. B, p. 6.) The agreement, he said, contained provisions flatly prohibiting lock-outs and discrimination against union members. If, as charged, the Company's actions did constitute a partial lockout or were discriminatory, then they violated the agreement. The determination of that question, he concluded, was for the arbitrator. (App. B, p. 8.)

The argument that subcontracting was "strictly a function of management" and that, therefore, no dispute involving subcontracting could be arbitrable he found not to withstand analysis. First, he said, the management clause in the contract did not sustain it. That clause specified management rights but did not expressly reserve the unlimited right to subcontract. (App. B, p. 9.) Nor did the district court's finding that the Company had in fact subcontracted work without Union protest in the past fill the gap. For the question to be arbitrated here was not whether management's rights included the right to subcontract work, but whether under the circumstances of this case it abused that right by exercising it in a way which violated other provisions of the agreement, and that question was not "strictly" one of management's rights. (App. B, p. 9-11.) Second, he said, the failure of the Union to obtain the clause forbidding *all* subcontracting which it proposed in 1956 did not prove that the contract could not be construed in a more limited way, as prohibiting subcontracting which violated other provisions of the agreement. (App. B, p. 9-11.)

Finally, he concluded, the findings of the district court that no violation of the contract occurred went to the merits of the grievance, not its arbitrability. It was unnecessary, in his view, to decide whether the Fifth Circuit should adopt

the *Cutler-Hammer*[3] doctrine as the Sixth Circuit did in the *American Manufacturing* case[4] or reject it as the First Circuit did in the *New Bedford Products Division*[5] case, since the grievance in this case was not so lacking in substance as to fall within the ambit of the *Cutler-Hammer* doctrine. (App. B, p. 8, n. 8.)

REASONS FOR GRANTING THE WRIT

1. This case presents, in a somewhat different context, essentially the same problem that is presented in *United Steelworkers* v. *American Manufacturing Co.*, 264 F. 2d 624 (6th Cir. 1959) (petition for certiorari filed in this Court August 28, 1959, No. 360). In that case, the Sixth Circuit refused to order arbitration of a grievance which concededly did involve a dispute as to the application of a particular section of a collective bargaining agreement because, in the court's view, the evidence clearly showed that the Union's claim was "baseless" on the facts. In the present case, the Fifth Circuit—Judge Rives dissenting—refused to order arbitration because, in its view, there was no language in the collective bargaining agreement which could be construed as forbidding the management action which the Union's grievance challenged. In both cases, the essential question is the same: to what extent, if any, should a federal court, when asked to compel arbitration of a union's claim that an employer has violated a collective bargaining agreement, enter into an examination of the merits of that claim before directing that it be settled in the forum which the parties have specifically chosen to settle such claims.

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[3] *International Ass'n of Machinists* v. *Cutler-Hammer, Inc.*, 67 N. Y. S. 2d 317, 271 App. Div. 917 (1st Dept.), *aff'd*, 297 N. Y. 519, 74 N. E. 2d 464 (1947).

[4] *United Steelworkers of America* v. *American Manufacturing Co.*, 264 F. 2d 624, now pending on petition for certiorari in this Court, No. 360, October Term, 1959.

[5] *New Bedford Defense Products Division* v. *Local 1113, UAW*, 258 F. 2d 522, 526-27.

We have set forth in detail in the petition for certiorari filed in the *American Manufacturing* case (No. 360), copies of which will be served on the respondent herein, the reasons why we believe that this issue should be resolved by this Court. For the same reasons there set forth we urge that certiorari be granted also in this case.

2. Since the filing of the petition in No. 360, the United States Court of Appeals for the Tenth Circuit has rendered a decision directly contrary to the present decision of the Fifth Circuit, in a case which is indistinguishable from the present case in its essential facts. *Local 1912, IAM* v. *United States Potash Co.*, 44 LRRM 2861 (10th Cir., Sept. 8, 1959). That case also involved a suit under Section 301 to compel arbitration of a grievance which claimed that the employer had violated the applicable collective bargaining agreement by subcontracting certain work formerly performed by employees covered by that agreement. The agreement contained no language expressly prohibiting subcontracting, and the union's position in that case, as in this case, was that the agreement limited by implication management's right to contract out the work of the bargaining unit. In language similar to that of the collective bargaining agreement at issue here, the agreement in the *United States Potash* case provided that "all matters related to this Company and its operations and employment with or by this Company . . . are exclusively within the jurisdiction of the Company and *not subject to Union action or consent or to arbitration,* except such . . . conditions of employment as are specifically provided in the terms of this agreement . . . ". (Emphasis added.) It also provided that "only a question or questions as to the proper interpretation or application of this argument may be submitted to arbitration."

The Tenth Circuit held, in direct conflict with the holding of the Fifth Circuit in the present case, that the grievance was arbitrable and that the lower court had erred in refus-

ing to compel arbitration. The court refused to consider the merits of the grievance itself, pointing out that the court's function was simply "to determine whether the grievance dispute can be fairly said to present a question as to the interpretation or application of the contract. If so, the judicial function is at an end and the proper interpretation of the contract is for the arbitrator." Citing *New Bedford Defense Prod. Div.* v. *Local 1113, UAW*, 258 F. 2d 522 (1st Cir. 1958), the court stated that "grievances do not lose their arbitrability because we think they can be correctly decided only one way."

The court held that the absence of specific reference to subcontracting in the agreement

> "does not necessarily mean that subcontracting is excluded from the scope of the bargaining agreement. The contract is not couched in terms of specified grievances which are to be arbitrated, thereby excluding all others by implication. Nor does it specify the grievances which are not to be arbitrated, thereby including all others. See *Lodge No. 12, etc.* v. *Cameron Iron Works*, 257 F. 2d 467; Annot. 24 ALR 2d 752. Instead, it leaves room for interpretative implications of coverage, to be derived from an implied covenant of good faith and fair dealings which are the very lifeblood of collective bargaining agreements." 44 LRRM at 2863.

Noting that arbitrators had often found implied restrictions on subcontracting, and that courts sometimes had found none, the Tenth Circuit pointed out that "it is not for us to resolve the contrariety or to choose between the courts and the arbitrators. It is enough that the contrariety raises a question as to the proper interpretation or application of the contract—a function which belongs to the arbitrator." 44 LRRM at 2863.

3. The nature of the grievance in the present case raises

an additional and perhaps even more important problem which is not present in No. 360, the *American Manufacturing* case. In *American Manufacturing* the Sixth Circuit recognized that the particular grievance there involved was governed by the seniority section of the collective bargaining agreement, but the court refused to compel arbitration on the ground that in its view the company's action had been so clearly consistent with the agreement that the union's grievance was "baseless." In the present case, on the other hand, the majority of the Fifth Circuit refused to order arbitration on the ground that in their view the subject matter of the grievance which the Union sought to arbitrate was not covered by the collective bargaining agreement at all.

As we pointed out in the petition in *American Manufacturing*, there is a conflict between the decision of the Sixth Circuit in that case and the First Circuit in *New Bedford Defense Prod. Div.* v. *Local 1113, UAW*, 258 F. 2d 522 (1958), as to whether a court should evaluate the merits of a grievance before ordering arbitration once it is plain that the proper disposition of the grievance is governed by the agreement. The Sixth Circuit held that in such a case a grievance is not arbitrable if the court finds that the grievance is "baseless" on the facts. The First Circuit took the opposite position that "the Court in a §301 proceeding has no business to concern itself with a preliminary question whether the answer to the grievance on its merits may or may not be entirely clear under the language of the agreement." 258 F. 2d at 526.

It seems clear, therefore, that the First Circuit would have decided the *American Manufacturing* case contrary to the way the Sixth Circuit did. It is not nearly so clear, however, that the First Circuit would have decided *Warrior & Gulf* differently than the Fifth Circuit did.

Each time the First Circuit has been asked to compel arbitration in a case which, like *Warrior & Gulf*, involves a question as to whether the substantive provisions of the

agreement govern the particular grievance at all, that court, like the Fifth Circuit in the present case, has held that that is a question for the court. See *Local 149, American Fed. of Technical Engineers* v. *General Elec. Co.*, 250 F. 2d 922 (1st Cir. 1957), *cert. denied*, 356 U. S. 938 (1958); *Local 201, IUE* v. *General Elec. Co.*, 262 F. 2d 265 (1st Cir. 1959). The reasoning of the First Circuit seems to start from the premise that the court cannot compel arbitration until it has determined that the employer has an obligation to arbitrate. In a particular case, this means the union must show that the employer has an obligation to arbitrate the particular grievance. This is not shown, the First Circuit reasons, merely by pointing to the fact that the employer has agreed to arbitrate every question of "interpretation or application" of the agreement. The court must find that a particular substantive clause of the agreement applies to the particular grievance. A claim that the clause applies is not enough. The court must interpret the clause and find it applicable to the particular grievance or there is no question of application for the arbitrator.

For example, in the *Local 201* case, *supra*, the court stated:

> "Since under the particular agreement the court must preliminarily determine whether respondent has promised to submit Graciale's grievance to arbitration as involving 'the interpretation or application of a provision of this Agreement,' it is not enough that appellant local may *claim* that the Graciale grievance necessitates the interpretation or application of the seniority provisions of Art. IX. The court must be satisfied that this claim is well founded, that is, that the arbitrator can use those provisions as a controlling statute to decide the merits of the grievance." 262 F. 2d at 271 (emphasis in original).

The First Circuit thus seems to hold, in apparent agree-

ment with the Fifth Circuit, that the question whether a particular clause in the agreement, or any clause in the agreement, applies to a particular grievance is a question of interpretation for the court—not preliminarily, as under the *Cutler-Hammer* doctrine, but exclusively. Once the Court concludes that the grievance is governed by a substantive provision of the agreement, however, the First Circuit, unlike the Sixth Circuit, will compel arbitration without making a *Cutler-Hammer* kind of examination to determine whether there is arguable merit in the particular grievance on its facts.

It is clear that reasonable men can differ as to whether a particular grievance is or is not covered by a collective bargaining agreement. In *Local 149, supra,* the First Circuit held that an agreement which merely set forth job classifications and rates of pay could not resolve a dispute as to whether certain jobs had been placed in the wrong classification. This decision was strongly criticized by at least one highly respected labor relations expert and arbitration. See Cox, *Reflections Upon Labor Arbitration,* 72 Harv. L. Rev. 1482, 1512-13 (1959). Similarly, the Tenth Circuit, relying in part on the reported awards of several labor arbitrators, has disagreed with the Fifth Circuit's view that in the absence of specific language to the contrary a collective bargaining agreement cannot be construed to limit management's right to subcontract the work of the bargaining unit.

The plain fact is, of course, that when a court holds that the provisions of an agreement do not restrict management's right to subcontract (as in this case) or to assign employees to different shifts (as in the *Local 201* case, *supra*) or to put particular jobs in particular job classifications (as in the *Local 149* case, *supra*) it resolves the very dispute over the interpretation and application of the agreement which is at the heart of the grievance. The court thus usurps the function of interpreting the agreement which the parties have agreed shall be performed by an arbitrator.

Every collective bargaining agreement covers, either expressly or by implication, all matters relating to the employment relationship. If a particular provision of the agreement is applicable to a grievance then that provision limits management's rights. If no provision is applicable then, under the management's rights clause, or the implied reservation of management's rights which exists even if there is no such clause, the agreement provides that management's rights in that respect are not limited. It is therefore erroneous to reason, as the First Circuit does, that the court must determine whether the subject matter of a particular grievance is covered by the agreement or not covered by the agreement. The question, rather, is whether the grievance involves a matter on which management's rights are restricted by the agreement or a matter on which, under the agreement, management is to be free of restriction. The resolution of that question is plainly a question of the interpretation of the agreement as a whole, and is a question which is reserved for the arbitrator.

The question of the correctness of the doctrine expressed by the Fifth Circuit in this case, and by the First Circuit in the cases cited, is at least as important as the question presented in cases like *American Manufacturing* and *New Bedford Defense Products*. In those cases, the First and Sixth Circuits disagree as to the role of a court where it is clear that management's rights are governed by a particular clause in the agreement and the question is one of interpreting and applying that clause to a particular grievance. In this area, on the other hand, the First, the Fifth and, presumably, the Sixth Circuits are in agreement, but the Tenth Circuit disagrees, as to whether the court or the arbitrator shall decide, not as to whether there is an arguable question, but, finally, whether any clause in the agreement applies to a grievance.

Whatever their relative importance, however, the two kinds of cases really involve the same basic issue: to what

extent should a federal court consider the merits of a grievance before ordering arbitration. In the view of the Tenth Circuit, and in our view, it is not for the courts to resolve, either finally or preliminarily, questions of "the proper interpretation or application of the contract" but to enforce the agreement of the parties that this is "a function which belongs to the arbitrator." But, whichever view is correct, the issue, in one form or the other, has been the subject of so much conflict, confusion and needless litigation in the lower courts that it should be settled by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX A

In the

UNITED STATES DISTRICT COURT

For the Southern District of Alabama

UNITED STEELWORKERS OF AMERICA, AFL-CIO, AN UNINCORPORATED ASSOCIATION, *Plaintiff*, v. WARRIOR & GULF NAVIGATION COMPANY, A CORPORATION, *Defendant*.	Civil Action No. 2100

The above entitled cause came on to be heard upon motion for preliminary injunction under Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. 185, based upon plaintiff's complaint to compel defendants to arbitrate, under a labor contract, whether defendant has the right to contract out, or subcontract, maintenance work. The plaintiff's motion for preliminary injunction was set down for hearing on October 30, 1958, prior to which defendant filed in opposition to the motion for preliminary injunction, a motion to dismiss, and answer to the complaint. At the hearing on that day counsel for the parties stipulated that all pleadings and matters presented by them be consolidated, tried, and disposed of at one and the same time, and that testimony and other evidence be presented as if on final hearing for a permanent injunction as well as the preliminary injunction. The Court

on the same day, after hearing arguments by opposing counsel, and after duly considering same, reserved ruling on defendant's motion to dismiss the complaint and on the plaintiff's motion for preliminary injunction, and denied an oral motion by plaintiff to strike the Second, Third and Fourth defenses of the defendant's answer. Testimony and exhibits were presented by the parties, with opportunity for cross-examination, after which the matter was on the same day submitted to the Court. The Court, having duly considered the arguments, citations of legal authorities, pleadings and evidence of the parties submitted herein, and being fully advised in the premises and after due and full consideration, now makes the following:

FINDINGS OF FACT

1. The plaintiff, United Steelworkers of America, AFL-CIO, is an unincorporated labor organization within the meaning of Section 2 (paragraph 5) of the National Labor Relations Act, 61 Stat. 137, U. S. C. 152, and Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. 185. The plaintiff is engaged in representing employee members in collective bargaining with employers who are employed in the steel industry, including the defendant, Warrior & Gulf Navigation Company, a corporation having its principal place of business at Chickasaw, Alabama, within this District and engaged in transporting steel products through several Southern states as a contract carrier regulated by the Interstate Commerce Commission. The aforesaid activities of the plaintiff and the defendant affect commerce within the meaning of the statute above cited.

2. The plaintiff and the defendant are parties to a contract covering the maintenance employees, among others, at the Chickasaw terminal, dated September 25, 1956, and effective until midnight September 25, 1959, the pertinent portions of which read as follows:

SECTION 10
ADJUSTMENT OF GRIEVANCES

Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

A. For Maintenance Employees:

First, between the aggrieved employees, and the Foreman involved;

Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic;

Third, between a member or members of the Grievance Committee and at the option of such committee a representative of the National Organization of the Union, and the Vice President;

Fourth, between the representatives of the National Organization of the Union and the representatives of the Company; and,

Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Company and the Union.

SECTION 11
MANAGEMENT

The management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union.

3. On August 22, 1958, a number of employees signed a grievance which was presented to the defendant by the plaintiff and which read as follows:

We are hereby protesting the Co[illegible]any's actions, of arbitrarily and unreasonably contr[illegible]out work to other concerns, that could and prev[illegible] has been performed by Company employees.

This practice becomes unreasonable, unjust and discriminatory in lieu of the fact that at present there are a number of employees that have been laid off for about 1½ years or more for allegedly lack of work.

Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lock-out, of a number of the employees who would otherwise be working were it not for this unfair practice.

4. The plaintiff has not suggested that there is any provision in the labor contract which supports this grievance, and there is in fact no provision in said labor contract on which it may be grounded. Plaintiff contends that the language in Section 10 of the contract is broad enough to require that this dispute be submitted to arbitration; it asserts that the Court has the duty of determining whether there is any issue to be arbitrated.

5. The defendant was first organized in 1940, and, as an incident to its transportation business, maintains and operates a repair and maintenance yard at its main terminal at Chickasaw, Alabama.

6. The defendant has contracted out construction, repair and maintenance work practically since the inception of its business; it first signed a labor contract with the plaintiff several years prior to the present one.

7. The defendant has contracted out such repair maintenance and construction work solely for reasons of economy and efficiency.

8. Throughout the successive labor agreements between these parties, including the present one, the plaintiff has demonstrated that it was and has been aware of the defendant's practice of contracting out such work, and it has unsuccessfully sought to negotiate changes in the labor contracts, and particularly during the negotiation of the present labor agreement, in the year 1956, which would have limited the right of the defendant to continue the practice of contracting out such work.

9. None of the contracts between the parties affecting the employees involved here has ever contained any provision limiting or abridging in any manner the defendant's right to contract out work of any kind, nor has there been any complaint or grievance at any time prior to August 22, 1958, that any of the labor contracts between the parties in any way limited or abridged the right of the defendant to contract out maintenance or repair work.

10. The Court has read the labor contract carefully and is unable to find in it any provision which could be interpreted to mean that the defendant has surrendered its managerial right to contract out work, or whereby the defendant has agreed to confide in an arbitrator the right to review the defendant's business judgment in contracting out work.

11. On the other hand, the labor contract expressly recognizes the existence of, and reserves to the sole judgment of defendant, matters which are strictly a function of management; and the labor contract expressly prohibits arbitration of matters which are strictly a function of management. The Court finds that the contracting out of repair and main-

tenance work, as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here.

12. The defendant has five different contracts with labor organizations, three of them with the plaintiff (one at Port Birmingham, Alabama, covering employees of the defendant there; the second, which is the one here involved, covering the employees at the terminal at Chickasaw, Alabama; and the third covering the deck hands and other unlicensed personnel aboard all of defendant's vessels); the other two labor contracts of defendant are with the Marine Engineers Beneficial Association covering the engineroom personnel aboard its vessels, and with the Master, Mates, and Pilots Union covering the wheelhouse employees aboard its vessels.

13. There has been no showing by the plaintiff that the defendant has engaged in or, insofar as these proceedings are concerned, could be adjudged to have engaged in any conduct which has violated any of the provisions of the present labor contract.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact the Court concludes:

1. The Court has jurisdiction over the parties and the subject matter under Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. 185.

2. The parties are properly before the Court.

3. The issue presented is whether the defendant can be compelled to arbitrate the grievance protesting the contracting out of work.

4. The labor contract does not prohibit, and is not susceptible of being interpreted to require that defendant is prohibited from contracting out work.

5. The labor contract does not give the plaintiff or any of its members or any of the employees of the defendant the right to have arbitrated the question of whether the defendant may contract out work.

6. The right to contract out work is an inherent, traditional right of management which may not be questioned or subjected to arbitration in the absence of agreement on the part of the defendant or an express limitation thereof set forth in the labor contract.

7. The Court has considered the specific contention that Section 10 requires arbitration "should any local trouble of any kind arise," and finds from examination of the remainder of Section 10, of Section 11, of the contract as a whole, the evidence and the arguments of the parties, that this language cannot be interpreted to limit the right of the defendant to contract out work.

8. Defendant may not be required to arbitrate the grievance, and consequently defendant may not be restrained from refusing to arbitrate said grievance since plaintiff has no right to arbitration of the grievance under the labor contract.

ORDER

An order shall be and it is hereby entered denying the motion for a preliminary and permanent injunction and dismissing the complaint.

It Is, Therefore, Ordered by the Court that this cause be and the same hereby is, Dismissed, with costs taxed against plaintiff.

Made at Mobile, Alabama, this 22nd day of December, A.D., 1958.

DANIEL H. THOMAS,
United States District Judge.

U. S. District Court, Sou. Dist. Ala. Filed and entered this the 22nd day of December, 1958.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 17646

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Appellant,
v.
WARRIOR & GULF NAVIGATION COMPANY,
Appellee.

Appeal from the United States District Court for the Southern District of Alabama.

July 30, 1959

BEFORE: HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a denial by the trial court of an order granting specific performance of an agreement to arbitrate. The action was brought by the appellant, United Steelworkers of America, AFL-CIO, against the appellee, Warrior & Gulf Navigation Company, under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185. The sole question presented by the suit is whether, under the terms of the collective bargaining agreement between the parties, unilateral action by the employer in contracting out work that had previously been per-

formed by members of the bargaining unit gave rise to a dispute which is subject to arbitration. The district court held that it did not, and, accordingly, dismissed the Union's complaint.

The employer is engaged in the transportation by barge of steel products and raw materials used in the manufacture of steel. It maintains a terminal at which it performs certain repair and maintenance work on its barges. During the term of the current collective bargaining agreement the company undertook to contract with others to perform some of this maintenance work. This resulted in the filing of a grievance by the union which averred as follows:

> "Nature of Grievance. We are hereby protesting the Company's actions, of arbitrarily and unreasonably contracting out work to other concerns, that could and previously has been performed by Company employees.
>
> "This practice becomes unreasonable, unjust and discriminatory in view of the fact that at present there are a number of employees that have been laid off for about 1½ years or more for allegedly lack of work.
>
> "Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lock-out, of a number of employees who would otherwise be working were it not for the unfair practice."

The Company took the position, which it adhered to in the suit below, that the matters dealt with in the grievance were not subject to grievance procedures. These grievance procedures are provided for by Section 10 of the collective bargaining agreement, the first paragraph of which follows:

> "Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section."

This language is immediately followed by a second introductory paragraph upon which the appellant places major reliance. It provides:

> "Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner: . . ."

In bringing its suit for specific performance of an agreement to arbitrate the appellant must, of course, show that the collective bargaining agreement places on appellee the duty to arbitrate. *Local No. 149* v. *General Electric Co.*, 1 Cir., 250 F. 2d 922, 927. The initial determination whether such duty arises under the contract must be made by the court. *Local No. 149* v. *General Electric Co., supra; Engineers Association* v. *Sperry Gyroscope Co.*, 2 Cir., 251 F. 2d 133, 137. Since an agreement relating to the processing of grievances, including compulsory arbitration, may appropriately be dealt with by the parties as they see fit, it is of course within the competence of the Union and the employer to limit the subject matter of such grievance procedures. Here the parties introduced the section dealing with grievances by an initial withdrawal from the provisions of the section of any matters "which are strictly a function of management." We have heretofore in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Greyhound Corporation*, 5 Cir., 231 F. 2d 585, stated that whatever subjects are not covered by an employment contract are left to the parties to act upon as they see fit. The contract before us does not deal with the power of the employer to contract with others to perform services previously done by its employees. Since this

is a matter as to which an employer may, except as limited by a specific collective bargaining agreement, do without violating either state or federal law, it remains, so far as relates to this agreement, strictly a matter of management. Even if this result did not follow from the fact that the contract does not restrict such action, it would nevertheless follow by reason of the construction of this collective bargaining agreement in the light of the conduct of the parties in negotiating it.

The trial court, upon ample evidence, made the following findings of fact:

> "8. Throughout the successive labor agreements between these parties, including the present one, the plaintiff has demonstrated that it was and has been aware of the defendant's practice of contracting out such work, and it has unsuccessfully sought to negotiate changes in the labor contracts, and particularly during the negotiation of the present labor agreement in the year 1956, which would have limited the right of the defendant to continue the practice of contracting out such work.
>
> "9. None of the contracts between the parties affecting the employees involved here has ever contained any provision limiting or abridging in any manner the defendant's right to contract out work of any kind, nor has there been any complaint or grievance at any time prior to August 22, 1958, that any of the labor contracts between the parties in any way limited or abridged the right of the defendant to contract out maintenance or repair work." 168 F. Supp. 702, 704-5 (1958).

Thus, what we have here is a collective bargaining agreement resulting from negotiations between the parties, one of which sought to include a provision prohibiting the company from contracting out some of its work. Having failed

at the conference table to obtain the consent of the other party to the inclusion of such provision, it signed the contract that was finally worked out, presumably by a process of "give and take" between the parties. It is not only consistent with basic principles governing the construction of a contract for the court, as it did, to hold that the final product should not be construed to give the Union the provision it had unsuccessfully sought to have incorporated, but it would be unconscionable for the court to hold to the contrary. Whatever may be meant ordinarily by the term "inherent rights of management," (Cf. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Greyhound Corporation, supra*) we clearly have here a matter which by the agreement of the parties, is "strictly a matter of management."

Having decided that the criticized action of the Company is action which by the agreement of the parties was not to be a subject of arbitration, we conclude that the trial court correctly decided that the action for specific performance must fail. *See Local No. 149* v. *General Electric Co.*, 1 Cir., 250 F. 2d 922; *United Steel Workers of America* v. *American Manufacturing Co.*, 6 Cir., 36 CCH, Lab. Cas. ¶ 65,300.

The appellant attempts, by characterizing the simple facts of contracting out maintenance work as "unreasonable, unjust and discriminatory," and by asserting such conduct by the Company amounts to "inducing a partial lockout," to set the complaint within a frame of reference comprehended by the agreement to arbitrate. This, however, cannot change the fact that the criticized action, by whatever name called, remains exempted from the range of arbitration. Moreover, it is plain that characterizing this action as "discriminatory" is not sufficient to bring it within the prohibition of the contract which forbids "discrimination against any member of the Union." This is so because there is no discrimination charged in the grievance except that the contracting out occurred at a time when there "are a number of employees

that have laid off for about 1½ years or more allegedly because of lack of work." Nor does the characterization of the Company's action as "a partial lockout" bring it within the language of the section making a "lockout on the part of the Company" a violation of the agreement. Any contention that such action as is here criticized amounts to what is known in labor-management relations as a "lockout" is clearly a simple play on words and is insubstantial.

The judgment is AFFIRMED.

RIVES, Circuit Judge, dissenting:

Originally of like view with my brothers and the learned district judge, further study and reflection have brought me to the certain conclusion that this judgment should be reversed.

The union's grievance as stated by a group of laboring men need not meet the technically precise requirements of strict pleadings. As quoted in the majority opinion, it clearly states: first, that the employer has engaged in the practice of subcontracting to such an extent that, under the conditions currently prevailing, the practice amounts to a partial lockout in violation of the express terms of the collective bargaining contract, and, secondly, that the employer has engaged in this practice for the purpose of discriminating against members of the union, again in violation of the express terms of the contract.[1]

In order to determine the arbitrability of this grievance, reference must be made to Section 10 of the contract, which provides, in pertinent part, as follows:

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[1] In its brief, the union also suggests that the grievance is premised upon the theory that the employer's actions are in violation of the purpose, recognition, wages, and seniority clauses of the contract. Such allegations do not, however, raise a different theory for these clauses are ultimately dependent for their content upon the discrimination and lockout clauses.

"ADJUSTMENT OF GRIEVANCES

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner: . . ."

Section 10 then proceeds to outline a five-step grievance procedure culminating in arbitration by an impartial umpire selected by the parties.

The decision in this case ultimately turns upon the interpretation given to the above-quoted provisions of Section 10. The employer, on the one hand, contends: that the first paragraph of Section 10 creates an overriding exclusion from the general arbitration provisions that follow; that this exclusion is for judicial cognizance rather than merely a direction of the arbitrator; and that the matter of subcontracting falls entirely within this exclusion in that it is "strictly a function of management." The union, on the other hand, joins issue on each of these points, contending: first, that no overriding exclusion from the general arbitration provisions is created; secondly, that, even if such an exclusion were created, the context renders it clear that the exclusion is no more than a direction to the arbitrator; and, finally, that, in any case, the matter of subcontracting without any restrictions is not "strictly a function of management," but, rather, is limited by other provisions of the agreement. I agree with the contention of the union on this third point, and hence do not reach the first two.[2]

[2] With respect to the questions raised concerning the first paragraph

Insofar as the union's grievance is premised upon the theory of a partial lockout, the controlling section of the agreement, in my view, is Section 3, which provides:

"ILLEGAL SUSPENSION OF WORK

"A strike or stoppage of work on the part of the employees represented by the parties signatory hereto shall be a violation of this Agreement, and there shall be no strikes, work stoppages, interruptions, or impeding of work. Likewise, a lockout on the part of the Company shall also be a violation of this Agreement."

The blanket prohibition of strikes and lockouts is nowhere qualified in the Agreement. On the contrary, the entire tenor of the Agreement is that the parties are seeking complete stability. By Section 3 the employer has unreservedly relinquished any managerial prerogative it might have had to resort to a lockout and, at the same time, it has subordinated any retained management functions to the overriding qualification that they not be exercised to effect a lockout. Any other construction would render nugatory the express provisions of Section 3.[3]

It therefore seems clear that, if the charges contained in the union's grievance of August 22 are true, the actions of the employer in subcontracting work are in violation of Section 3 of the contract. The essential question then is whether the contract contemplates the determination of these charges by arbitration. When attention is directed to the nature of the issues raised by the charges, it is clear that this question must be answered affirmatively.

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of Section 10, appellant's observation that "this can hardly be said to be a model of contractual draftsmanship" seems well taken.

[3] It cannot be said of the present arbitration clause as was said in Refinery Employees Union vs. Continental Oil Co., 5th Cir. No. 17344, decided June 24, 1959: "The arbitration clause in the case at bar is not a broad grant of authority to the arbitrators, a *quick pro quo* for giving up the right to strike."

In the first place, the contract provides for the arbitration of "differences . . . as to the meaning and application of the provisions of this Agreement." Clearly such differences are involved here. The dispute turns upon the meaning and application of the term "lock-out" as it appears in Section 3. Moreover, the contract provides for the arbitration of "any local trouble of any kind." A dispute as to the existence of a partial lockout would seem to be equally well covered by this provision.[4]

The decision of the district court below was premised upon acceptance of the employer's contention that subcontracting is "strictly a function of management" under the terms of the contract, and, therefore, disputes in reference thereto are expressly excluded from the scope of the arbitration provisions by the first paragraph of Section 10 of the Agreement.

Such a premise does not, however, withstand close examination. The management functions clause itself in the contract certainly does not sustain it. That clause provides only that

> "[t]he management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union."

The employer has sought to avoid the implications of the absence of any express provision for the retention of the matter of subcontracting as a management function by reliance upon evidence which it contends establishes a practical construction of the contract to that effect, and which is

[4] See Timken Roller Bearing Co. v. N.L.R.B., 6th Cir. 1947, 161 F. 2d 949, wherein the Court of Appeals for the Sixth Circuit took a similar view of an identical arbitration provision.

summarized in the district court's findings of fact numbered 8 and 9, quoted in the majority opinion. Though those findings are amply supported by the evidence in the record, they are of no avail to the employer here. This is so because they fall entirely short of justifying the conclusion that unrestricted subcontracting in violation of other provisions of the collective bargaining agreement cannot give rise to an arbitrable grievance.

At the very most, these findings establish only that subcontracting is not, in itself, a violation of the contract and that the practice of subcontracting as it was engaged in by the employer during the earlier years of the relationship between the parties did not involve a breach of any other provisions of the contract. Quite obviously, these propositions do not dispose of the issues of this case. Since the allegation of a partial lockout is based upon *currently prevailing conditions,* the history of the relationship between the parties is in no way inconsistent with the union's present contention.[5] To borrow the words of a well-known labor arbitrator—"The . . . issue . . . is not whether the Company may contract out *all* of its work or *none* of its work. It is whether there was any implied contractual bar to the contracting out of *this particular . . . work . . . under the circumstances of this particular case.*"[6]

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[5] To hold otherwise would be to completely ignore the difference between a contract which limited or absolutely prohibited subcontracting and one which merely subordinated the employer's right to subcontract to the more general obligations imposed upon him by the collective bargaining contract, such as the obligation not to lockout and the obligation not to discriminate. The union's attempt to obtain a contract which would fall into the first of these categories certainly does not constitute an admission that the existing contract did not already fall into the second. Insofar as Finding of Fact No. 11 of the district court (168 F. Supp. 702, 705) is at variance with these views, it is incorrect.

[6] Ralph T. Seward, *Bethlehem Steel Co.*, 30 LA 678 (Emphasis in original.)

Insofar as the union's grievance is premised upon the theory that the employer has utilized the practice of subcontracting to discriminate against the members of the union, the case is even stronger. Section 11 of the contract *expressly* subordinates all management functions to the overriding limitation that they "not be used for purposes of discrimination against any members of the Union." Thus, "matters which are strictly a function of management," as that term is used in Section 10 of the contract, can never be interpreted to include disputes involving allegations of discrimination. To do so would involve ignoring express limitations in the management functions clause itself.[7]

In its Findings of Fact, the district court concluded that:

> "7. The defendant has contracted out such repair, maintenance and construction work solely for reasons of economy and efficiency.
>
> . . . . . .
>
> "13. There has been no showing by the plaintiff that the defendant has engaged in or, insofar as these proceedings are concerned, could be adjudged to have

[7] The interpretation given here to the term "strictly a function of management" cannot be objected to on the ground that it completely destroys the meaning of that clause. On the contrary, the clause is not without meaning, for it operates to preclude from arbitration any dispute as to the propriety of the exercise of a management function which does not involve a violation of other substantive provisions of the contract. For example, the employer need not arbitrate a dispute concerning his power to discharge for proper cause. If, on the other hand, the dispute involves an allegation that no proper cause for the discharge existed, or that the discharge was motivated by discriminatory purposes, the contract requires reference of the dispute to arbitration.

Similarly, the employer is under no obligation to arbitrate a dispute concerning his power to subcontract. But where, as here, the allegation is that this power has been utilized to violate other provisions of the contract, the duty to arbitrate arises.

Thus, the term "strictly a function of management" is interpreted to mean a function of management, the exercise of which does not involve a violation of any of the other provisions of the contract. Indeed, it is difficult to see how the word "strictly" could have any other meaning.

engaged in any conduct which has violated any of the provisions of the present labor contract." 168 F. Supp. 702, 704, 705.

Without expressing any opinion as to the correctness of these findings, they are without effect upon the course of this litigation. They involve a determination of the merits of the union's grievance, and, consequently, constitute an invasion of the province of the arbitrator as defined in the contract between the parties.[8]

I think that the judgment should be reversed, and therefore respectfully dissent.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant,

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[8] We are not here confronted with the necessity of determining whether this Court will adopt the so-called *Cutler-Hammer* doctrine. See *International Association of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N. Y. S. 2d 317 (Sup. Ct., 1947), aff'd without opinion, 297 N. Y. 519, 74 N. E. 2d 464 (1947). Under this doctrine, some courts have refused to order arbitration of a dispute otherwise clearly arbitrable on the ground that the plaintiff's grievance was so clearly without merit that no substantial question for arbitration was raised. See, *e.g.*, *United Steelworkers of America* v. *American Manufacturing Co.*, 43 LRRM 2757 (6th Cir. 1959). But see Judge Magruder's opinion in *New Bedford Defense Products Division* v. *Local 1113, U.A.W.*, 1st Cir. 1958, 258 F. 2d 522, 526-27. Without taking any view on the merits of this doctrine, I would hold that the grievance here sought to be arbitrated is not so lacking in substance as to fall within its ambit. The dispute is therefore arbitrable under the principles enunciated by this Court in *Lodge No. 12, etc.* v. *Cameron Iron Works*, 1958, 257 F. 2d 467, 471.

United Steelworkers of America, AFL-CIO, and the surety on the appeal bond herein, National Surety Corporation, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 443

UNITED STEELWORKERS OF AMERICA,
Petitioner,

versus

WARRIOR & GULF NAVIGATION COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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OCTOBER TERM, 1959

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Respondent opposes the petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in this cause on July 30, 1959.

QUESTIONS PRESENTED[1]

1. In an action under Section 301 (a) of the Labor Management Relations Act to compel arbitration pursuant to a collective bargaining agreement which provides for arbitration under limited circumstances, may the District Court determine whether the grievance is one

[1] The questions are here framed differently from those appearing in the petition, pp. 1-2. The decisions below, and, indeed, the petition herein, leave no room for doubt that the basic issue is whether the Court is obliged to determine arbitrarily or whether that is the exclusive function of the arbitrator. That is all the Courts below have decided, in dismissing the demand for arbitration.

which the parties agreed to arbitrate under the language of the contract?

2. Should the findings and conclusions of the Courts below, that the evidence disclosed no agreement by the parties to authorize arbitration of the subject matter covered by the grievance be disturbed?

STATEMENT OF THE CASE

Petitioner, United Steelworkers of America, AFL-CIO, herein called the Union, filed a grievance with respondent, Warrior & Gulf Navigation Company, herein called the Company, alleging violation of the collective bargaining agreement between them by virtue of the contracting out of certain repair work on its equipment while some of the employees were laid off.

The Company transports freight by barge. It first signed an agreement with the Union in 1952. R. 110. During the 12 years of its operation before that, and in all the years since 1952, the Company continuously contracted out maintenance, repair and construction work on its equipment. At no time have the parties agreed that there should be any limitation on the Company's right to do this. In all of these years the Company has continuously had employees on laid off status while such work was being contracted out. The Company has always relied primarily on nearby independent shipyards to do this work for it. The Union, despite layoffs regularly occurring in all the years since its first contract with the Company in 1952, filed no grievance with reference thereto until late in 1958, shortly before this suit was brought; but in the negotiation of prior contracts and of the current contract the Union sought unsuccessfully to negotiate a provision prohibiting the contracting out of repair work. R. 91-94; 96-104; 110-115; 144-145.

The history of the development of the Company's equipment and facilities, and the circumstances of World War II, explain the fluctuation of its mechanical force from a skeleton one, increased through years of construction, fitting and refitting in the Company's own yard, then back to a relatively small one—while all the time it was contracting out work of the same character. Since 1957, on completion of a program of construction and refitting begun after World War II, the Company's mechanical force has been about the size it was when operations were begun in 1940. R. 91-94; 96-104; 116.

The current contract was signed in November 1956. The evidence shows:[2]

Year	Work Contracted Out	Number of Mechanical Employees
1954	$234,000.	50
1955	33,940.	57
1956	37,484.	32
1957	41,162.	24
1958	48,000.	23

The conclusion of its construction and refitting program in the Company's own yard at the end of 1956 led to the reduction in the work force by 8 men; of the total of 24 men remaining in 1957, 5 later retired or quit, and 4 old employees were recalled in 1958. R. 100-102; 103, 128.

In contracting out work, the Company followed the common and necessary practice of sending its engineers and, at times, foremen, to specify and authorize at the outside shipyards the work to be done there, and to check

[2] Since the record is silent on the subject, only conjecture can be employed as to the significance of these figures, and they are presented here solely to give the correct information on the reference thereto made in the petition (p. 4, fn .1); it requires no proof, however, to assert that shipyard repair costs depend on the materials as well as labor, and a $100,000 job can involve very little labor but much engineering skill and the use of special equipment which is available only in certain yards.

periodically on its progress. These representatives of the Company did not supervise men engaged in that work; however, some ex-employees (or employees in laid-off status) may have worked for one or more of these outside shipyards from time to time and chanced to do some work on equipment of the Company in the course of that employment. R. 56-58; 107-108.

The Company's operations are covered throughout by five labor union agreements, three of them with this union. This unionized personnel has increased from 182 when the first contract was signed with the Union in 1952 to a present total of 238. R. 93-95. The supervisory force was not reduced when the mechanical force was cut by 8 men in 1957, because these supervisors direct the work of scores of tow-boat employees, as well. R. 116.

The issues were fully litigated in the trial of the case. The Union insisted upon a full trial, with testimony of witnesses on all points, R. 50, including the testimony of its own witnesses disclosing in detail the Union's attempt and failure to win at the bargaining table, for specific inclusion in the contract, a voice in contracting out repair work, the identical thing which it now asks the Court to read into the contract. R. 140-141; 144-145. The Union has, both expressly and tacitly, over the years, recognized that its contracts did not make this issue arbitrable; by a strained grasping (without tendering proof) at vague possibilties of "discrimination," and equally vague reference to provisions of the contract obviously not pertinent to this question, it seeks the opportunity to gain through an arbitrator that which it well knows and has long demonstrated that it well recognizes to be without the scope of arbitration, simply because it has been unable to obtain that objective in collective bargaining.

REASONS FOR DENYING THE WRIT

1. In the *Lincoln Mills* case,[3] judicial enforcement of contractual arbitration was recognized, and the Courts were left with the responsibility of fashioning the arbitration law to govern when and under what circumstances enforcement was to be ordered.

The guideposts indicated by the Supreme Court in that case have been utilized to some extent in the consideration of the cases falling under the *Lincoln Mills* doctrine, but hardly enough time has elapsed for maturity of the various applicable questions and the jurisprudence thereunder. In general, enforcement of arbitration proceeds apace. These orders have been numerous; the cases in the Federal Courts on the subject have had little effect on the broad scheme of arbitration. The petition makes no showing justifying urgent review of this particular case. *United Steelworkers v. American Mfg. Co.*, 264 F. 2d 624, 6th Cir., 1959, now pending on Petition for Certiorari, No. 360, and *Local 1912, IAM v. U. S. Potash Co.*, 44 LRRM 2861, 10th Cir., 1959, as well as the other cases cited by the Union in support of its petition are sharply distinguishable from the instant proceeding on the contract language, findings and conclusions, as well as the facts and equity. In the *American Mfg. Co.* case the arbitration provision covered "**any** disputes, misunderstandings, differences or grievances arising between the parties," and, moreover, the Court went exhaustively into the evidence to determine that the dispute itself was without merit. In the *U. S. Potash Co.* case there was no showing, by the Union's own witnesses, and no Court finding to the effect that the parties construed the contract to exclude from arbitration

[3] *Textile Workers Union of America v. Lincoln Mills*, 1957, 353 U.S. 448.

the question of contracting out repairs.[4]

2. The essential factor present here is that the Union failed to sustain the burden of showing that the grievance is arbitrable under the contract. The contract forbade arbitration of disputes in certain cases; it did not provide for unqualified arbitration. If the Courts have the authority to compel arbitration, it must be assumed that this authority is to be used to enforce that which the parties have agreed upon. And who is to determine what the parties have agreed upon, if not the Court which must order the parties to comply with that on which they have agreed? Obviously, then, the Courts must construe the agreement. Though there appears to be no disagreement among the Courts over this, the Union argues that arbitrability is a question for the arbitrator, not the Courts. All that was done by the District Court, and the Circuit Court of Appeals, in this case, was to construe the contract to determine arbitrability. Petitioner would have the Supreme Court direct the federal courts to order to arbitration every dispute where it is asserted by a party to a contract that the issue is arbitrable, regardless of all else; or where there is any **possibility,** however remote or unrealistic, that the dispute might be arbitrable in the view of any one human being. As to the latter, who but the Courts is to say that

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[4] The District Court decision, filed July 31, 1958, at Albuquerque, N. M., unreported, in the *U. S. Potash* case, found (Finding No. 7) that the subject of contracting out work had never been discussed in negotiations. But the instant case shows the Union tried in vain to negotiate into the contract a prohibition against the Company's right to contract out repair work. *Cf. Sunnyvale Westinghouse Salaried Employees Association et al v. Westinghouse Electric Corporation*, W.D. Penna., August 18, 1959, 175 F. Supp. 685, and in particular at p. 693; Findings Nos. 36, 37, 47.

The record in the *U. S. Potash* case reveals other important distinctions, such as (1) the language of the "management functions" provision of the labor contract, which expressly excepted "matters of employment" from the company's reservation of exclusive power, and (2) the Potash company's action in bringing in an outside employer to do work with outside personnel on the Potash company's own premises and with the use of some of the Potash company's own facilities.

there is such a possibility? The Union itself brought out in the District Court the evidence of its repeatedly unsuccessful attempts during negotiation of this and previous contracts to obtain that which it now seeks to gain through arbitration; the Union itself disclosed during these proceedings its clear understanding that the agreement foreclosed arbitration to such a management function as contracting out repair work. The contract itself manifests no agreement to arbitrate disputes of this kind. The intent of the parties is clear. The District Court and the Circuit Court of Appeals have said that there cannot be read into the agreement something which is not there. The Courts have the duty to require proof of an agreement to arbitrate this kind of a dispute before ordering arbitration; such proof was conspicuously lacking, and there is, therefore, no warrant for an order of arbitration herein. *American Federation of Technical Engineers v. General Electric Co.*, 1st Cir., 1957, 250 F. (2d) 922, cert. den., 356 U.S. 938; *Boston Mutual Life Ins. Co. v. Insurance Agents' Int. Union*, 1st Cir., 1958, 258 F. (2d) 516; *Engineers Assn. v. Sperry*, 2nd Cir., 1957, 251 F. (2d) 133; *Lodge No. 12, Int. Assn. of Machinists v. Cameron Iron Works*, 5th Cir., 1958, 257 F. (2d) 922, cert. den., 79 S. Ct. 120, and, especially, cases cited therein; *International Union, UAW v. Benton Harbor Malleable Industries*, 6th Cir., 1957, 242 F. (2d) 536. The *Cameron Iron Works* case relied on the *General Electrict* case of the First Circuit, above cited, which the Supreme Court had declined to review, where at 250 F. (2d) 922, 929-930, it was stressed that the plaintiff had the burden of proving arbitrability to the **Court**, and that the **Court**, "before undertaking to decree specific performance of a contract for arbitration, must necessarily first determine, as a matter of law, whether the alleged refusal to arbitrate is a violation of any term"

of the contract. In the *Sperry* case, *supra*, the Second Circuit reached the same conclusion, 251 F. (2d) 133, 137, holding that the difference between the Court and arbitration proceedings on arbitrability and the merits, respectively, "is in the quantum of proof necessary for the moving party to obtain relief. * * * Determination of arbitrability only requires that the moving party produce evidence which tends to establish his claim." The record here discloses no evidence whatever in support of the Union's claim, but is overwhelmingly destructive of that claim. The principle enunciated in the cases here cited is without conflict in any Circuit. It is the principle applicable here, and the only one applied by the District Court and the Circuit Court of Appeals below.

The petition for the writ of certiorari should be denied, and for this respondent prays.

Respectfully submitted this 6th day of November, 1959.

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PROOF OF SERVICE

I, Richard C. Keenan, one of the attorneys for Warrior & Gulf Navigation Company, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of November, 1959, I served copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the petitioner, the other party hereto, by mailing copies in duly addressed envelopes, with first class certified air mail postage prepaid, to its attorneys of record, as follows:

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IN THE

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OCTOBER TERM, 1959

No. 443

UNITED STEELWORKERS OF AMERICA,
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versus

WARRIOR & GULF NAVIGATION COMPANY,
Respondent.

On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

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On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED[1]

1. Does the extent of the District Court's authority under Section 301(a) to enforce agreements permit it to fully interpret such agreements to determine whether there has been a breach of a promise to arbitrate?

2. Did the District Court properly exercise its authority and discretion in deciding that contracting out

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[1] The opinions below are found in the Transcript of Record, herein referred to by designation "R," at p. 101, District Court, and at p. 109, Circuit Court of Appeals.

work was not subject to arbitration under this agreement?

STATUTES INVOLVED

The statute directly involved, Section 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. Section 185(a), is set out in petitioner's brief at p. 5. Also pertinent are portions of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. Section 151, 160(l); the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 542, Section 704(e), 29 U.S.C. Section 158(e); the Railway Labor Act, 44 Stat. 577, 45 U.S.C. Section 153(i) and (p), 157 and 159; and the U. S. Arbitration Act, 61 Stat. 669, 9 U.S.C. Sections 3-4, which appear in the appendix to this brief.

STATEMENT

Respondent, Warrior & Gulf Navigation Company, hereinafter sometimes called the Company, and petitioner, United Steelworkers of America, hereinafter sometimes called the Union, entered into a 3-year labor contract in 1956 (R. 5-21), providing for limited arbitration of disputes thereunder. Section 10; R. 15-17.[2] The Union filed a grievance questioning the Company's right to contract out maintenance work.[3] The District Court

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[2] Section 10 reads, in pertinent part:

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner:

* * * * *

"Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decisions. * * * *"

[3] The term "subcontracting" is sometimes erroneously used in the record and briefs herein; the Company does not sub-let, it is the *owner* which contracts out certain repair work which it desires done on its own equipment.

rejected an application by the Union to compel the Company to arbitrate this question, after a showing that (1) the contract contained no prohibition against contracting out work, R. 5 *et seq.*; R. 99; (2) the Union had unsuccessfully attempted to negotiate such a restriction into this labor agreement and into the parties' preceding labor contracts, R. 74-75; 98-99; (3) the contract, Section 10, R. 15, vested strictly management functions exclusively in the Company, including, Section 11, R. 17-18, the direction of the working force and its reduction for lack of work or other legitimate reasons, and (4) the Company had for many years, without objection by the Union, R. 66, 76-77, openly construed the agreement to permit such contracting out of work with resultant fluctuations in its work force. On these findings, the District Court, R. 101 *et seq.*, and the Circuit Court of Appeals, R. 109 *et seq.*, concluded no agreement had been made to arbitrate such a grievance.

Petitioner states, Br. p. 11, that between March, 1956, and December, 1958, "the Company almost halved the bargaining unit from 42 to 23 men by greatly increasing the amount of maintenance work (which these employees could perform and had performed in the past) contracted to other companies," and that contracting companies "used" Warrior & Gulf supervisors to lay out the Warrior & Gulf work. These statements are misleading; moreover, why the odd period between March, 1956, and December, 1958, was selected is not explained.

The 3-year contract involved here was signed in November, 1956. R. 73. The first, of several successive such labor agreements between the parties, was executed by them in 1952. R. 73. The evidence shows, R. 60-61, 65-68, 78-79, 86:

Year	Work Contracted Out	Number of Mechanical Employees
1954	$234,000	50
1955	33,940	57
1956	37,484	32
1957	41,162	24
1958	48,000	23[4]

The conclusion of its construction and refitting program in the Company's own yard at the end of 1956 led to the reduction in the work force by 8 men; of the total of 24 men remaining at the beginning of 1957, 5 later retired or quit, and 4 old employees were recalled in 1958. No grievance was filed until August, 1958, R. 76, almost two years after (1) the last contract was signed and (2) the last reduction in the work force.

Shipyard repair costs depend on materials as well as labor, of course, and a $100,000 job can involve very little labor but much engineering skill, expensive material and special equipment which is available only in certain yards. Nor does the record bear out the statement that the maintenance work contracted out was, to any appreciable extent, work which the laid-off employees "could perform and had performed in the past." The record shows that the Company did not deviate from its practice of contracting out this work, and that it contracted out no more than in previous years; that the layoffs were occasioned by a return to normal maintenance after a period of special work. R. 66-67. The most

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[4] The Company has contracted out maintenance repair work from the inception of its operations in 1940, R. 58, 59, 66. It employed as many as 92, in 1951, in its maintenance force, reduced thereafter to 47 in 1952, and increased to 51 in 1953. R. 60. This table is limited to the years beginning in 1954 because the record contains no figures on the dollar volume of work contracted out in prior years. R. 67-68 The total increase in work contracted out in the last 4 years was $14,000, an average of $3,500 per year. It would have cost the Company more than that per year (40 hours times 52 weeks) for *one* more man. R. 8 shows rates for the mechanics and helpers involved here.

sizeable reduction, in the period for which figures are in the record, came between 1955 and 1956, when 25 employees were laid off out of 57, while the work contracted out increased only $3544.00. Further, it is inaccurate to state that the contracting companies "used" Warrior & Gulf supervisors to lay out the Warrior & Gulf work. In contracting out work, the Company followed the common and necessary practice of sending its engineers and, at times, foremen, to specify and authorize at the outside shipyards the work to be done there, and to check periodically on its progress. R. 36-37, 70-71.

The *Union* introduced the line of testimony going to the *merits* of the *grievance*. R. 34, *et seq.*; the Company's opposition to the injunction petition was based on the meaning of the contract's arbitration provision, and its evidence was as to the legal effect that could be given thereto in the light of the parties' demonstrated intent. R. 29, 57-79. The Union below contested consideration by the Court of evidence as to the proper *legal* construction to be placed on this contract i.e., on the issue of arbitrability, contending that such evidence goes to the merits of the case.

SUMMARY OF ARGUMENT

In each of its several collective bargaining agreements with the respondent, the petitioner sought to negotiate the very relief which it in this proceeding seeks to obtain through arbitration. The labor contract may be likened to a statute governing the parties, subject to similar rules of construction and flexibility; the "legislative history" of this contract shows the parties' intent in discussing, but rejecting the inclusion therein of a provision limiting contracting out work. That intent is confirmed not alone by the absence of any pro-

vision thereon in the agreement, but also by the continuous practice of the respondent in contracting out work throughout its entire history of operations, including the years of contractual relations with petitioner, during which no grievance concerning the practice was filed until that in the instant case, which came almost 2 years after the contract was signed and the last layoff of employees affected by the contracting out practice.

The labor contract here does not provide for unqualified arbitration of all disputes, as do some, but limits arbitration to interpretation of the contract's terms and excludes from arbitration management functions like directing the work force and, for legitimate reasons, reducing it. It is the court's duty to construe to determine whether there has been broken a promise to refer the issue to arbitration before it may compel arbitration; the court may not be used under Section 301(a) of the Taft-Hartley Act as a mechanical device for ordering parties to arbitration where it is convinced that they have not agreed to arbitrate. The legislative history of this statute and the other federal labor laws making up our national labor policy frown on governmental compulsion as to the substantive terms in collective bargaining, underscore the active role of the court in determining contract breach under Section 301(a), and clearly contemplate active participation by the court in the arbitration scheme. Finally, public interest will best be served by a policy which encourages certainty, rather than uncontrolled enlargement by arbitrators, of the parties' stipulation to arbitrate.

ARGUMENT

I.

The District Court had the authority to interpret this promise to arbitrate, as it would any other agreement, to determine whether there was a breach thereof.

(a) **Background.**

Before *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), there was no settled right to compel, by federal equity decree of injunction,[5] adherence to the terms of a labor agreement. Section 301(a) of the Labor Management Relations Act, 1947[6] had been interpreted previously to allow only damage suits for breach of contract, in view of the Norris-LaGuardia Act anti-injunction disability imposed on the district courts. *Mead v. Teamsters*, CA-1, 1954, 217 F. 2d 6. Because arbitration is favored in the Norris-LaGuardia Act, however, this Court in the *Lincoln Mills* case found it consistent with the federal labor policy to allow injunctive relief under Section 301(a)—the only available statutory authority for such—for the limited purpose of enforcing agreements to arbitrate and arbitration awards thereunder. All of this, of course, relates to private litigation, for where the Government has sought injunctions in labor cases the Norris-LaGuardia Act has not prevented their issuance, either because legislation subsequent to the Norris-LaGuardia Act expressly permitted it, *Mead v. Teamsters*, 217 F. 2d at p. 9, or because the proper exercise of executive authority warranted it, *United Steel-*

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[5] *Bull S. S. Co. v. Seafarers' Union*, CA-2, 1957, 250 F. 2d 326, cert. den. The Union in the instant case seeks, under the equity powers of the District Court, an order of specific performance by injunction. R. 3.

[6] Section 301(a) of the Taft-Hartley or Labor Management Relations Act, 1947, was not affected by the changes made in the Labor-Management Reporting and Disclosure Act of 1959.

workers v. U. S., No. 504, U.S. , 4 L. Ed. 2d 12 (1959).

Before proceeding, it is necessary to examine Section 301(a) and its legislative history. There can be no doubt Congress intended thereby, along with other provisions of the Taft-Hartley Act, to swing the balance of power back somewhat from the extreme to which unions had been favored in the Norris-LaGuardia and Wagner Acts;[7] this section, and the companion Section 303 were designed to give federal court access, with decisions by federal judges and juries, to private parties hurt by breach of contract and certain other specified private wrongs.[8] All this has been recognized so far by this Court up to the point of the question directly raised here.[9] What must now be decided is whether, while directing the federal district courts to hear and decide all aspects of contract breach cases where damages are sought, Section 301(a) does not clothe those courts with authority to fully and fairly construe arbitration provisions in those contracts where specific performance is sought.

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[7] 93 Cong. Rec. 7690 (1947).

[8] 93 Cong. Rec. A3232, 4410, 5139, 5290, 6609, 6612 (1947). See, also, House Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947), p. 42, stating that "unions that engage in these practices to the injury of another may subject themselves to liability under *ordinary principles of law*"; Senate Minority Rep. No. 105, Part 2, 80th Cong., 1st Sess. (1947), p. 475, declaring that Section 301 "does not * * * create a new cause of action but merely makes the existing remedy available to more persons * * * "; Senate Majority Rep. No. 105, 80th Cong., 1st Sess. (1947), pp. 421-424, referring to the "right of action in the Federal courts"; House Minority Rep. No. 245, 80th Cong., 1st Sess. (1947), p. 109, pointing to the "question of conferring upon Federal courts *broad* power to entertain suits for violation of union agreements." Our emphasis. The debates and reports clearly evince the intent of Congress to have the courts retain their traditional power to interpret contracts and to try these cases as they would any others; all that was added was a longer arm, to reach those until then beyond its reach because of absence of diversity and jurisdictional amount. See detailed legislative history in Appendix to *Textile Workers Union v. Lincoln Mills*, 353 U.S. at p. 485 *et seq.*

[9] *Assn. of Westinghouse Employees v. Westinghouse Elect. Corp.*, 348 U.S. 437 (1955) , and *Lewis v. Benedict Coal Corp.*, ___ U.S. ___, 4 L.Ed. 2d 442 (1960).

The question is not difficult where the parties have provided for unlimited arbitration,[10] or have by express language shown the issue to be arbitrable;[11] it raises problems only where the contract must be interpreted from something other than the clearest kind of language in the agreement itself. In these latter cases, there being a possibility that some arbitrators might conceivably consider the issues arbitrable, are the hands of the court tied except to refer them, in its own injunction order, to arbitration? Or may it see for itself whether these private parties have agreed to arbitrate before issuing its equity order compelling specific performance?

It is also necessary, at the outset, to restate the role of collective bargaining in our national labor policy. Collective bargaining comes before arbitration, of course,[12] and it is *free* bargaining, without compulsion to agree.[13] The arbitration, if any, which is agreed upon in such bargaining, is thus consensual, *voluntary* arbitration. The interpretation of that agreement to arbitrate must be what the parties intended.

As noted in *NLRB v. Insurance Agents Union*, No. 15, ... U.S. ....., 4 L. Ed. 2d 454, 465 (1960), "our labor policy is not presently erected on a foundation of Government control of the results of negotiations. See S. Rep. No. 105, 80th Cong., 1st Sess., p. 2." Congress intended that the parties should have wide latitude in their negotiations, unrestricted by governmental regulation of the substantive solution of their differences. *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959).

Section 301(a) and its legislative history can be read

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[10] *Union Contract Clauses*, Commerce Clearing House, Inc., Chicago, 1954, p. 599, ¶ 51,552.08.

[11] Cf. *In re Bradley*, 30 Labor Arbitration Reports 1060 (1958).

[12] National Labor Relations Act, Section 1, 29 U.S.C. 151.

[13] *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395, 402 (1952).

to mean only that labor contracts are to be interpreted by the federal courts in the same manner that they interpret all other contracts; that is, with due regard for all pertinent factors (including the special nature of labor agreements, the arbitration process, and industrial relations). There is no national labor policy on arbitration which is superior to the national labor policy on freedom of contract in collective bargaining, and the express statutory basis of relief found in Section 301(a), and the penumbra thereof,[14] represent the latest expression of our national labor policy by the designation of the federal district courts as the judges of arbitrability. Once the court's power to order arbitration is conceded, public policy is no longer a consideration and there remains only a determination of *private* rights.

In the *Lincoln Mills* decision, the courts are directed to find the federal substantive law from four sources:[15] (1) all national laws, (2) the Labor Management Relations Act, (3) the penumbra of express statutory mandates, and (4) state law if compatible with the purpose of Section 301.[16]

It is evident, too, from the statutory language thereof that the procedural law must be consistent with the purpose of Section 301.

Some light is found in national law other than the Labor Management Relations Act. For example, though

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[14] *Textile Workers v. Lincoln Mills, supra*, 353 U.S. at p. 457.

[15] 353 U.S., at page 456.

[16] Surely *Lincoln Mills* does not direct that the *only* federal substantive law to be *fashioned* under Section 301(a) is that wherever the conventional arbitration and no-strike clauses appear the only function of the courts is to order *final* and binding arbitration on *any* claim, whether arbitrable or not in the view of the court, that some provision, express or implied, has been breached. Cf. pet. Br. pp. 44, 50. The decision obviously contemplates the development of a new phase of federal law "by the (progressive) course of litigation." Cf. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, at pp. 480-481 (1955).

it may not apply to labor agreements,[17] a question on which this Court found it unnecessary to pass in its *Lincoln Mills* decision, the U. S. Arbitration Act, 61 Stat. 669, 9 U.S.C., Sect. 1, nonetheless represents federal public policy in the enforcement of arbitration agreements, and it, Sections 1, 4, empowers the district court, by judge or jury, to fully "hear and determine" whether there has been an agreement to arbitrate before directing that the dispute be arbitrated.[18] The Railway Labor Act, 45 U.S.C., Sections 151-163, 181-188, is another source of guidance in the national law; here we find grievance arbitration through the Railroad Adjustment Board and the National Mediation Board subject to court protection against abuse of the authority granted by the parties for arbitration.[19] Some light is given, too, by jurisprudence under the National Labor Relations Act. There we find no refusal to bargain in management unilateral action, after execution of the agreement, on subjects of demands made and rejected, as here, in the negotiation of the contract, *Matter of Jacobs Mfg. Co.*, 94 NLRB 1214 (1951), enf'd, *NLRB v. Jacobs Manufacturing Co.*,

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[17] *New York University Eighth Annual Conference on Labor*, Matthew Bender & Co., Inc., Albany, N. Y., 1955, pp. 427 *et seq.*

[18] *Engineers Assn. v. Sperry*, CA-2, 1957, 251 F. 2d 133, 136, notes that while the U. S. Arbitration Act is not binding in cases involving Section 301 of the Taft-Hartley Act, it does provide a "guiding analogy." The legislative history shows that the intent was to enforce arbitration agreements "in the same way as other portions of the contract." 65 Cong. Rec. 11080 (1924).

[19] In *Brotherhood of Railway and S. S. Clerks v. Atlantic Coast Line RR*, CA-4, 1958, 253 F. 2d 753, an award by arbitration of the Railroad Adjustment Board was set aside, the Court noting that this statute, part of the national labor policy, provides that suit for enforcement of such awards shall proceed like *all other suits* in federal court. 45 U.S.C. Section 159, Third (b), allows court interpretation of the agreement to arbitrate to determine whether the arbitrator's award was authorized thereby; 45 U.S.C. Section 153, First (p), makes the arbitration findings, on application for enforcement in the district court, only *prima facie* evidence of the facts therein, and directs the court to "proceed in all respects as other civil suits." See, also, Smith and Merrifield, *Labor Relations Law*, The Bobbs-Merrill Co., Indianapolis, 1960, page 876: "In setting up the National Railroad Adjustment Board, Congress proceeded upon the basis of fifty years of experience with various attempts to provide effective methods of settlement of disputes in the railroad industry."

CA-2, 1952, 196 F. 2d 680, 8 Labor Law Journal 676, 688, fn. 70 (Oct. 1957), though the duty to bargain, once a union is certified—which may be equated to the duty to arbitrate once there is a collective bargaining contractual provision on arbitration—continues even after a contract is signed. Thus, no impediment to the encouragement of collective bargaining has been found in the refusal to bargain as to matters already rejected in bargaining; the District Court in the instant case may be said to have found no injury to the arbitration process in foreclosing arbitration to a matter already thrashed out and discarded by the parties themselves.[20] Finally, Congress in the Labor-Management Reporting and Disclosure Act of 1959, Section 704(e), recognizing the frequency of subcontractor clauses as the means of limiting normal management functions, sanctioned the express use of such subcontract clauses in certain situations which otherwise might render them unlawful.[21] State law "compatible with the purpose of Section 301," *Textile Workers v. Lincoln Mills*, 353 U.S. at p. 457, may be found which does not compel arbitration unless the party demanding it *introduces evidence* of the existence of an arbitrable dispute. *Engineers Assn. v. Sperry*, 251 F. 2d at p. 137, referring to the New York law.[22] If the various other

[20] Finding 8, R. 105.

[21] Cf. Rothman, General Counsel of NLRB, "The Law and Secondary Boycotts in Perspective," 45 LRRM 390, 397 (1960): "Collective bargaining agreements frequently contain provisions which prohibit employers from subcontracting work which is normally done within the bargaining unit * * * ."

[22] Cox, *Cases on Labor Law*, Foundation Press, Brooklyn, 4th Ed., 1958, pp. 775-776, notes that "the issue most frequently litigated under such statutes as Article 84 of the New York Civil Practice Act is the power of the arbitrator to make an award upon the issue which one party wishes to submit * * * Since the basic theory of judicial intervention was that the courts were enforcing a contract made by the parties, the issue of arbitrability *vel non* was simply a question of contract interpretation." Minnesota in 1957, and Wyoming in 1959 adopted the Uniform Arbitration Act, which follows the pattern of the New York statute, recommended in 1955, on the basis of long experience, by the Conference of Commissioners on Uniform State Laws. 9 Uniform Laws Annotated, p. 76.

applicable federal laws—the Norris-LaGuardia Act, the National Labor Relations Act, the Taft-Hartley Act and the Labor-Management Reporting and Disclosure Act of 1959—are read with the comprehensive labor arbitration provisions of the Railway Labor Act, the national labor policy on arbitration (pending further Congressional action thereon) would appear to give to the federal district courts the scope of authority contended for here.

(b) The District Court may determine arbitrability before ordering arbitration.

There appears to be no court decision which questions the right and, indeed, the *duty* of the district court to determine arbitrability. On the other hand, the courts, after full consideration of the arguments urged by petitioner here, have held it to be inescapable that a court which is called upon to issue an injunction must necessarily decide something.[23] *UAW v. Benton Harbor Malleable Industries*, CA-6, 1957, 242 F. 2d 536; *Local 149, Amer. Fed. of Tech. Engineers v. Gen. Elect. Co.*, CA-1, 1957, 250 F. 2d 922; *Boston Mutual Life Ins. Co. v. Ins. Agents Union*, CA-1, 1958, 258 F. 2d 516; *Engineers Assn. v. Sperry*, CA-2, 1957, 251 F. 2d 133; *Independent Petroleum Workers of America, Inc. v. Standard Oil Company*, CA-7, 1960, ... F. 2d ....., 45 LRRM 2843. It logically follows from the nature of the suit under Section 301 that "the court must decide whether the plaintiff has made his case." Cox, p. 54, "Reflections Upon

[23] Cf. concurring opinion of Mr. Justice Reed, *Assn. of Westinghouse Employees v. Westinghouse Electric Co.*, 348 U.S. 437, at p. 463: "Since the contract entered into through provisions of the Labor Act creates rights over which Congress had legislative authority, a breach of that contract is likewise within its powers. Congress by Section 301 has manifested its purpose to vest jurisdiction over breaches, to a certain extent, in the federal courts * * *. The course of action for breach of contract is thus a course of action arising under federal law * * * ." Cf., also, dissent, *Ibid* at page 465, in agreement therewith that the Taft-Hartley Act made labor contracts subject to "construction and interpretation" by the federal courts.

Labor Arbitration in the Light of the Lincoln Mills Case," *Arbitration and the Law*, Proceedings of the Twelfth Annual Meeting, National Academy of Arbitrators, BNA Incorporated, Washington, D.C. (1959), and, at page 55 of same work, arbitrators cannot be treated as "administrative agencies to which all disputes * * * must be referred in the first instance or even treat them as courts of general jurisdiction * * * as long as arbitration is consensual and the obligation of the court is to enforce a voluntary agreement * * *. In my judgment there is not the slightest basis for criticizing judicial opinions which say that * * * arbitrability is for the court * * * ."

The *Lincoln Mills* case must be interpreted to the same effect, for it is axiomatic that the power to order implies the authority to refuse to order. Certainly it was not the intent of Congress to make the federal courts a mere conduit for automatic and mandatory submission of all questions to arbitration; on the contrary, "It cannot be too often repeated that judges are not automata." *Universal Camera v. NLRB*, 340 U.S. 474, at p. 489. The *Lincoln Mills* decision, having approved arbitration enforcement under Section 301(a), must be read to leave it to Congress to limit the equity jurisdiction of the courts in such matters, if that is to be done.

So, when may the court refuse, and when must it order a reluctant party to proceed to arbitration when the contract does not *by express language* indicate the parties' intent? Thus far, the lower courts have suggested some answers: (1) If there is a broad arbitration clause—either covering every subject which could conceivably come under the contract, or covering every dispute whether or not related to the contract—the district court has no choice but to compel arbitration.

Commerce Clearing House *Union Contract Clauses*, p. 599, ¶ 51,552.08. *Lodge No. 12, Int. Assn. of Machinists v. Cameron Iron Works*, CA-5, 1958, 257 F. 2d 467. (2) If the subject-matter of the grievance appears, by fair construction of the contract, outside the scope of the agreement therein to arbitrate, the parties will not be compelled to submit the merits to arbitration. *UAW v. Benton Harbor Malleable Industries*, CA-6, 1957, 242 F. 2d 536; *Local 149, Amer. Fed. of Tech. Engineers v. Gen. Elect. Co.*, CA-1, 1957, 250 F. 2d 922; *Boston Mutual Life Ins. Co. v. Ins. Agents Union*, CA-1, 1958, 258 F. 2d 516; *Engineers Assn. v. Sperry*, CA-2, 1957, 251 F. 2d 133; *Independent Petroleum Workers of America, Inc. v. Standard Oil Company*, CA-7, 1960, F. 2d , 45 LRRM 2843.

Analogy may be drawn between the specific requirement, made by the parties themselves in their contract, of court determination of arbitrability prior to arbitration of any issue,[24] and the requirement of prior determination of arbitrability necessarily inherent in Section 301(a). Can it be said that one gives, or can give, greater authority to the court than the other?

When Congress enacted Section 301(a) in 1947 it did so as part of a scheme in a modification 15 years later of our national labor policy originally set in motion by the Norris-LaGuardia Act in 1932 if not in the earlier Clayton Act; the Taft-Hartley Act provided remedies in Section 301(a) against breach of contract and in Section 303 against certain unfair labor practices by unions. The history behind these provisions is that unions had not been subject to reach, because unincorporated and for

[24] See *Cameron Iron Works*, CA-5, 1958, 257 F. 2d at p. 470, fn. 7; *Int. Union of Electrical and Machine Workers, AFL-CIO. v. Gen. Elect. Co.*, Conn. Super. Ct., Fairfield County, 1959, 36 Labor Cases (CCH) ¶ 65,273.

other reasons overcome by the new statute, and it was felt necessary to make redressable those unfair labor practices denounced in Section 303 and contract violations (Section 301). Congress could have entrusted these remedies to an expert body like the National Labor Relations Board, or established a special labor court; it chose, instead, to let the federal judiciary construe the contracts for breach thereof and to determine whether the practices denounced in Section 303 were in fact engaged in. Congress having had no hesitancy in entrusting such a vital part of our national labor policy to the judgment of the federal courts, it is beside the point to urge, as do some arbitrators, that only arbitrators are competent to judge whether *arbitration commitments* in labor agreements have been violated—when Congress has said plainly in Section 301(a) that when such a contract is there taken for relief *the federal court* shall interpret it.[25]

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[25] Pet. brief, p. 44. So abundant has been labor litigation in the federal courts since the Taft-Hartley Act was adopted in 1947 that it may be questioned that federal judges are less expert in labor relations theory and practice, including arbitration principles, than many, if not most arbitrators. For every arbitrator who has handled 100 labor arbitration cases, there may be 50 who have heard less than 10. See, also, Aaron, "On First Looking into the Lincoln Mills Decision," *Arbitration and the Law*, Proceedings of the Twelfth Annual Meeting of the National Academy of Arbitrators, BNA, Inc., Washington, D. C. (1959), pp. 8-9: "To me, Judge Magruder's position (in upholding the court's authority to determine arbitrability by contract interpretation, *Local 149, Amer. Fed. of Tech. Engineers v. General Elect. Co.*, CA-1, 1957, 250 F. 2d 922) is unassailable; moreover, I do not think it is weakened by the fact that not all of his brethren have his appreciation of the nice distinction between determining whether an arbitrable issue exists and determining the merits of an arbitrable issue. By now the parties should have a pretty good idea of the risks involved in submitting the question of arbitrability to a court for decision, and if they are dissatisfied with the results they must hold themselves principally to blame." Nor does it follow that arbitrators, even the most experienced, do not think like judges in this field. The veteran arbitrator Peter Kelliher very recently decided the issue, on practically identical facts, just as did the courts below in the *Warrior & Gulf* case here. *Matter of Minneapolis-Moline Co.*, 33 Labor Arbitration Reports 893 (1960). Cox, pp. 45-46, *Arbitration and the Law*, would, as an arbitrator, stress the same points for contract construction which persuaded the District Court and the Circuit Court here: The "*context in which (the agreement)* was *negotiated*," and " * * * legal doctrines, a sense of fairness, the national labor policy, past practice at the plant and perhaps industrial practice generally. *Of these past practice is the most significant.*" Emphasis supplied.

The effect of what has been said is that Section 301 imposes on the court the duty to determine whether there has been a breach, and in cases of this kind the *Lincoln Mills* decision limits its inquiry to whether there has been a breach of an agreement to arbitrate; beyond that the court may not go. The rest is for the arbitrator—*if* there has been a breach of the agreement to arbitrate.

The writers have frankly acknowledged, they have nowhere disputed, that the district courts, contrary to the view of petitioner here, *must* have the authority to construe the contract and facts as to arbitrability. That authority, they agree, is "unassailable." Aaron, *Arbitration and the Law*, pp. 8-9; Cox, *Arbitration and the Law*, pp. 24, 55; Rosenfarb, New York University Sixth Annual Conference on Labor, p. 161 *et seq.*; Rose, New York University Eighth Annual Conference on Labor, p. 351 *et seq.*

II.

The District Court acted properly in refusing to order arbitration in this case.

(a) The procedural and substantive law governing the court in deciding whether a grievance is arbitrable is that of a court of law and equity giving due regard to all pertinent factors.

As noted, the legislative history of Section 301 shows its purpose to give a realistic remedy for breach of contract. *Lincoln Mills'* use of Section 301(a) to compel arbitration does not detract from the Congressional purpose of providing a forum in the federal district court for the decision as to whether the contract was breached. If the agreement that is alleged to have been breached is an alleged *agreement to arbitrate*, then under Section 301(a) the federal district court must construe *that*

agreement—as it would construe any other labor agreement tendered to it in a Section 301 suit.

It has been urged that to permit the court to decide arbitrability is to permit it to decide the merits, but even if that were so, and it is *not* so in this case, such a circumstance is not novel in our law. Cf. *Land v. Dollar*, 1947, 330 U.S. 731, 739: "We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." That would also be true where arbitration was confined to specified subjects, or where a court would reject a claim for lack of jurisdiction without reaching the merits.

It is hardly likely that in all cases involving orders compelling arbitration or adherence to arbitration awards the courts will be able to avoid doing what the District Court did here, i.e., look at *some* facts. Anyway, there is a difference between evidence of jurisdiction (or arbitrability) and evidence as to the merits. As set forth in *Engineers Assn. v. Sperry*, 251 F. 2d at p. 137, it does not detract from the function of the arbitrator for the court to require enough proof to establish the claim of arbitrability.

The great body of contract law, and that of equity—from both of which the arbitrators develop their principles—is and should be as accessible to judges as to arbitrators, for the judges came first.[28] And, for that matter, judges can and do borrow from reasoning of arbitrators, too. The courts today are well prepared to apply

[28] The error of underestimating the capacity of the federal judge to adapt his decisions to the particular causes at hand has led some thinkers astray. "There is no reason for jettisoning principles of fairness and justice that are as relevant to the law's attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with other affairs, even giving due regard to the circumstances of industrial life and to the libretto that this furnishes in construing collective bargaining agreements." Dissent, *Lewis v. Benedict Coal Corp.*, ... U.S. ....., 4 L. Ed. 2d 442, at p. 455 (1960).

labor contract and labor arbitration principles in their interpretation of labor agreements.

The substantive law, then, that the courts should apply in determining arbitrability is primarily *the law* which has always governed when equity has been involved—with weighty consideration of the policies here enumerated, e.g., encouragement of *voluntary* arbitration but also of *free* collective bargaining, i.e., judicial recognition of what the parties themselves have agreed upon. The arbitration process can hardly claim superiority in flexibility or earthy justice over a court of equity. If those who feel that arbitrators are more sensitive than judges to the needs of the parties affected by labor contract interpretation would, instead, present their arguments in forthright fashion to the courts, they might soon withdraw their objections.[27]

Restatement of the Law of Contracts, American Law Institute, Volume 1, Sections 246, 247, pages 345, 349, sets out that parties having contracted on the subject matter concerning which there were known usages or customs prevailing, incorporated such usages or customs by implication into their agreements, nothing having been

[27] See p. 24, Cox, *Arbitration and the Law*: "The ruling that the federal courts are to develop a substantive law of collective bargaining agreements also presents a challenge to labor specialists and the legal profession. The federal judges start with a clean slate. The Supreme Court has instructed them to fashion a law * * * from the express provisions, the penumbra and the policy of our national laws. Outside of the area controlled by statute there is no more important treasury of experience than the record of grievance arbitrations. We may have been bemused by the precepts that justice requires deciding each case upon its merits and that no two contracts are quite the same, but surely we have not labored at the administration of collective bargaining agreements for almost two decades without arriving at some generalizations upon which the unbiased can agree even though partisan interests preclude unanimity * * *. Counsel will face the further problem of translating the ways of the industrial world into legal doctrines comprehensible to judges who lack industrial experience. However, if the professional arbitrators and labor lawyers who work with them can surmount these obstacles, the industrial jurisprudence which they have been developing might give wisdom and vitality to conventional law."

said to the contrary.[28] Therefore, as a matter of law, evidence on these customs is and was admissible and is pertinent to a determination of what the parties meant, *U. S. v. Manufacturers Cas. Ins. Co.*, D.C., N.Y., 1957, 158 F. Supp. 319; and the court is obliged, in carrying out its duty of determining whether the matter is arbitrable, to look at that evidence, though "the true standard of interpretation must be objective." P. 50 of Cox, *Arbitration and the Law*. The court must "ascertain the intent of the parties since the scope of the arbitration agreement and the authority of the arbitrator stem from their agreement * * * .". Rose, "Arbitration and the Courts," New York University Eighth Annual Conference on Labor, Matthew Bender & Co., Inc., New York, 1955, p. 351 *et seq.*, at p. 357. An arbitrator would, if so empowered, certainly have the right to consider this evidence in determining whether the matter is arbitrable; if the arbitrator would be empowered to rule on the arbitrability of the issue, the court which is bound, as here, to determine arbitrability, may also look at the evidence to the extent necessary to discharge its duty.[29]

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[28] For Alabama cases on this point see *City of Birmingham v. I. E. Morris and Associates*, 1951, 256 Ala. 273, 54 So. 2d 555; *Ingalls Iron Works Co. v. Ingalls*, 1951, 256 Ala. 124, 53 So. 2d 847. In both cases the Alabama Supreme Court said that to properly interpret contracts, the aid of parol evidence may be obtained to ascertain (*City of Birmingham* case, 54 So. 2d, at p. 558) "what were the circumstances under which a contract was made, what was the relation of the parties, and what was within their mutual knowledge * * * ." This becomes critical with reference to the evidence that the Union in negotiating this and previous labor contracts with the Company in the case at bar, sought unsuccessfully to obtain a provision limiting the right to contract out work, and with reference to the evidence that in all the years of contractual relations between the parties, throughout which time the Company continuously contracted out repair work, the petitioner made no complaint of contract violation until August, 1958. R. 76, 73-75.

[29] Under Fed. Rules Civ. Procedure, Rule 43(e), 28 U.S.C., p. 271, where facts are challenged by motion to dismiss, the plaintiff is required to support them by competent proof. *Hollywood Associates v. Morris*, D.C., N.Y., 1952, 13 F.R.D. 141; *Bucholz v. Dutton*, D.C. Mont., 1957, 153 F. Supp. 62.

Respondent, after filing its motion to dismiss, offered to submit the facts *bearing on arbitrability* to the Court by affidavit, as permitted by Rule 43(e), but petitioner insisted on hearing witnesses, R. 32, who at once were put on for the purpose of exploring the *merits of the grievance* itself, R. 34 *et seq.*

The emphasis placed on expertise by the critics of judicial interpretation of labor contracts finds a parallel in the construction by reviewing courts of NLRB orders. Ultimately Congress demonstrated its wishes in the matter through the Taft-Hartley and Administrative Procedure Acts, and the courts have since had much to say about the evaluation of facts which formerly they had been forbidden to disturb. *Universal Camera v. NLRB*, 340 U.S. 474, 497 (1951); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503 (1951). At the same time, in adopting the Taft-Hartley Act and providing for temporary injunctions in certain cases, Congress made certain that the courts should not be the mere automatic servant of the Labor Board (here likened to the arbitrator) which had to decide these cases on the merits, and stipulated for the use of their judgment as to what was "just and proper" and authorized their consideration of evidence. 29 U.S.C. Section 160(l). And the courts have not hesitated to reject the Board's judgment as to whether it had a case warranting a temporary injunction. *Madden v. Masters, Mates & Pilots*, D.C., N. Ill., 1958, 166 F. Supp. 862; *Alpert v. Steelworkers*, D.C., Mass., 1956, 141 F. Supp. 447.

(b) The District Court here did not abuse its authority or discretion in refusing to order arbitration.

It does not appear from petitioner's brief that it would necessarily contest the authority of the District Court to go into the facts, outside the contract, relating to arbitrability if the Court has authority to determine arbitrability; petitioner, rather, argues that (1) it is for the arbitrator to decide whether the issue is arbitrable, and (2) the Court decided this case on the merits not of arbitrability of the grievance but of the grievance

itself. But whatever else may be said with respect to the decisions appealed from, the District Court found, R. 105-106: (1) nothing in the contract limiting the Company's right to contract out work, Finding 9, and (2) nothing in the contract which it could construe to allow arbitration of a complaint against contracting out work, Finding 10, after finding that the Union had tried and failed to get a limitation thereon into the contract, Finding 8, and that the Company had engaged in this practice throughout its existence and its several labor contracts with the Union, Findings 5, 6, without objection by the Union, Findings 8, 9. Without more, the Court could have supported its conclusions, R. 107, Nos. 4, 5, that the contract did not limit contracting out work and did not allow arbitration of a grievance thereon. The Court found, further, R. 106, Finding 11, that, *in the light of the preceding findings*, the recognition by the parties in the express terms of the agreement of the reservation solely to management of unilateral action on "matters which are strictly a function of management" included the subject matter of the grievance. Thus, all the findings of fact necessary to the conclusion of law were based on *evidence as to arbitrability*, i.e., whether the contract required the Company to submit this grievance to arbitration—and if other findings and conclusions may be said to have related to the merits of the grievance itself, they were unnecessary, mere surplusage, and cannot affect the validity or soundness of the District Court's decision. The Circuit Court's opinion is based, R. 110-113, exclusively on those findings and conclusions of the District Court which deal entirely with interpretation of the contract language, and the conduct of the parties showing their intent with reference thereto.

Why did the contract not refer to this subject, one

commonly found in labor agreements?[30] Was the Court not entitled to ask, and be shown, why the contract was silent on this point? The explanation, freely admitted by the Union (R. 98-99), was that the parties had negotiated on this before this contract was executed, and before their earlier agreements were signed, and the Union had not succeeded in getting that limitation into the contract. R. 73, 75. The Court had a right to conclude that the Union was merely seeking to obtain by arbitration, there being no requirement therefor in the contract, that which it had not been able to obtain in collective bargaining—by a subversion of the arbitration process, as it were. Further illumination was shed on the bad faith

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[30] Significantly assigning this data to its section on "Management & Union Rights," the Bureau of National Affairs in its continuously current looseleaf service on *"Collective Bargaining—Negotiations and Contracts,"* p. 65:3, notes that "(r)estrictions on management prerogatives are imposed in 55 per cent of contracts * * * Limitations on the right of management to contract work, either within the plant or the outside, are treated in slightly over one-fifth of agreements * * * ." See, also, on detailed nature of labor contracts today—Updegraff and McCoy, *Arbitration of Labor Disputes*, Commerce Clearing House, Inc., Chicago, 1946, pp. 135-136. On the inclusion of clauses limiting subcontracting or contracting out of work—see Cox, *Arbitration and the Law*, p. 34; *Understanding Collective Bargaining*, 1958, Amer. Management Assn., Inc., New York, p. 51 ("The real trouble occurs only when management imposes further restrictions on itself by giving away essential management rights at a bargaining table. Typical union demands include * * * restriction of the right to sub-contract * * *. Demands of this type are clear invasions of the area of management prerogatives, yet management has been responding to pressure with increasing frequency * * * "; *Union Contract Clauses*, 1954, Commerce Clearing House, Inc., Chicago, p. 747; and literally hundreds of arbitration cases, including *Lone Star Steel Company and United Steelworkers of America, Local Union 4134* (1959), 32 LA 464; *Southern Bell Telephone & Telegraph Company and Communications Workers of America* (1959), 32 LA 351; *New York & Pennsylvania Company, Inc., and United Papermakers & Paperworkers, Local 701* (1959), 32 LA 131; *Kurth Malting Company and International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, Local No. 9* (1958), 31 LA 607; *National Lead Company and United Automobile, Aircraft & Agricultural Implement Workers of America* (1958), 30 LA 893; *Mack Manufacturing Corporation and United Automobile, Aircraft & Agricultural Implement Workers of America* (1958), 30 LA 1053; *Washington Gas Light Company and International Chemical Workers Union* (1957), 29 LA 824; *Joseph S. Finch & Company and International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America* (1957), 29 LA 609. See also *NLRB v. Local 294, Teamsters*, CA-2, 1960, 273 F. 2d 696, in which a union struck over the subcontracting of work.

of the Union in seeking arbitration here, and upon the meaning of the arbitration limitation, by these facts which the Court considered: (1) The Company had for many years done openly what it was doing now; the Union had not objected to the practice of contracting out. R. 105, Findings 5, 6, 8. (2) It was not until almost 2 years after the affected employees were laid off and the contract executed that the Union filed this grievance, the contracting out practice continuing all the time. R. 105, Findings 2, 8, 9.

In looking at the contract, the Court found express prohibition of arbitration on "matters which are strictly a function of management." R. 106, Finding 11. Management functions "vested exclusively in the Company," that is, outside the scope of arbitration, are set out in the contract to include "management of the Company" and "direction of the work-force, including the right to * * * relieve employees from duty because of lack of work, or for other legitimate reasons * * *." Section 11 (R. 17-18).

Although not necessary to sustain the decision below, there is respectable support for the argument that unions as well as management consider that "management rights" inherently include the right to contract out work, unless bargained away in the labor agreement. The view is widely held that a collective bargaining agreement represents concessions by management, and that it does not cover subjects not referred to therein. See fn. 30. *Collective Bargaining—Negotiations and Contracts*, BNA, Washington, D. C., p. 65:1. Management impliedly retains those prerogatives and functions which are not bargained away in the agreement itself. *1960 Guidebook to Labor Relations*, Commerce Clearing House, Inc., Chicago, p. 260. Even a vague management rights clause

suggests that the boundaries of arbitration may be narrower than under a contract without it.[31] And, as elsewhere noted herein, the national labor policy does not compel an employer *even to bargain* during the contract term on subjects on which management has refused to make concessions in negotiations. *Matter of Jacobs Mfg. Co.*, 94 NLRB 1214 (1951), *enf'd NLRB v. Jacobs Mfg. Co.*, CA-2, 1952, 196 F. 2d 680.

> **If an employer may not be found to have violated the National Labor Relations Act for refusal to *negotiate*, it may be argued that the national policy—which also protects the right of refusal to make concessions, *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395—militates against strained interpretation of an agreement to compel *arbitration* if the effect could be to force (as in this case) the employer—not merely to *negotiate*—to make the very concession he had managed to save (at perhaps crippling expenses in other concessions or in a major strike) in the collective bargaining struggle.**

The Union referred below, as it does here, Br. p. 63, to the later language of Section 10 (R. 15-17) making arbitrable "differences * * * between the Company and the Union * * * as to the meaning and application * * * of this agreement" and "local trouble of any kind", and suggests that it is sufficiently broad to require arbitration of this grievance.[32] Professor Cox has answered this

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[31] Cox, *Arbitration and the Law*, p. 52.

[32] The words "local trouble" are loosely set in the second paragraph of Section 10. These words do not enlarge the scope of arbitration. Cf. *Epperson v. Stacey*, 1957, 266 Ala. 396, 96 So. 2d 750: "If there exists inconsistency between two clauses of a contract which cannot be reconciled, the inconsistency must be resolved in favor of the prior clauses, unless an intention to thereafter qualify is plainly expressed." The rule of the State of Alabama would thus seem to give precedence to the exclusion from arbitration of those subjects covered by the first paragraph of Section 10 and by Section 11. See, also, *G. F. A. Assn. v. W. F. Covington Planter Co.*, 1939, 239 Ala. 562, 192 So. 2d 502.

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contention by pointing out the marked distinction between the so-called conventional and "wide-open" clauses. See fn. 37, *infra.*

Of course, to say that this grievance constitutes a difference between the parties as to the meaning of the contract is to ignore the limitation on arbitration therein and to assume that the contract covers the subject involved. The same argument could as logically be made if the contract expressly excluded from arbitration the subject matter here involved, yet the Union filed a grievance—there would there, too, be a "*claim*," pet. Br. 44, a difference of opinion, whether in good or bad faith, over the meaning of the contract. Construed, then, from the objectively-demonstrated intent of the parties, excluding outside contracting from arbitration, there was left nothing for the arbitrator to resolve, for there was no "difference" remaining between the parties as to the meaning of the agreement.

Before the Circuit Court of Appeals, for the first time, the Union in its brief urged, without argument, that the Company had an obligation implied from Sections 1 (Intent), R. 5, 2 (Recognition), R. 5-6, 5 (Wages), R. 8-10, and 9 (Seniority), R. 14-15, of the

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[32] (Continued)

The Union introduced no evidence as to the meaning of the term "local trouble," and there can be no more than speculation as to what those words here can mean.

Petitioner certainly does not contend that this provision covers everything that may arise between the parties that is not covered by the contract. This could allow the union through arbitration to take over the entire concern. The only reasonable way it may be interpreted is that it applies only to matters covered by the contract, but not covered specifically or in detail. Cf. Construction of another loose term, "Working conditions," in *In re Chicago, North Shore & Milwaukee Railroad Co.*, CA-7, 1945, 147 F. 2d 723, *cert. den.*, 325 U.S. 852; *N. J. Bell Tel. Co. v. Comm. Workers*, 1950, 5 N.J. 354, 75 Atl. 721; *The United Furniture Workers v. Little Rock Furniture Mfg. Co.*, E.D. Ark., 1957, 148 F. Supp. 129, 132.

contract not to contract out work. The dissenting opinion of the Circuit Court of Appeals, R. 114 and fn. 1, same page, R. 117, 118, similarly seeks to strain unrelated contract provisions to provide a basis for arbitration by pointing to the Lockout, Section 3, R. 6, and Discrimination, Section 2, R. 5, clauses. Each of these contract provisions covers a purpose entirely foreign to that involved in the right or practice of contracting out work. There is nothing inconsistent between the contracting out of work and any of these provisions. The *recognition* of the Union as the bargaining agent for the employees is exclusive; the *wages* provide the rules of compensation for those employees; the *seniority* language proteets against favoritism and discrimination among those employees; the *lockout* provision protects the employees against closing down the operation to bring economic pressure upon the Union or upon the employees in connection with a labor dispute. Discrimination refers to reprisal on account of union membership. These are provisions which have their geneses in other circumstances. For example, on "recognition," cf. *Local Div. 1509, Amalgamated Assn. of Street, Electric Railway and Motor Coach Employees v. Eastern Mass. Street Railway Company*, D.C., Mass., 1958, 162 F. Supp. 942, 944, and Commerce Clearing House *Union Contract Clauses* 59 *et seq.* (1954); on "lockout," cf. *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957); on "seniority," see Commerce Clearing House *Union Contract Clauses* 447 *et seq.*, "By establishing length of service as a yardstick, it seeks to eliminate favoritism and discrimination in employment." Protection against discrimination for union activity obviously has as its purpose the prevention of favoritism in some manner of non-members

over union members. The Company has 5 union contracts covering its employees, 3 of them with the petitioner. R. 61-62. The record does not show that it has *any* non-union employees.

The court below did not send this *claim* of petitioner to arbitration because it found that the parties had, by *objective* means, demonstrated their agreement not to make the subject of the grievance an arbitrable issue. In so deciding, it did not abuse its authority, it was its duty to fairly and fully construe what the parties had decided to arbitrate, and what not, in their agreement covering arbitration. It did what it had to do—it interpreted "to give the instrument the application which the author(s) would have provided." Cox, p. 52, fn. 66, *Arbitration and the Law.*

III.

The decision on review is supported by public policy considerations.

Although it has been noted that there are here not present the elements ordinarily found when the effectuation of public policy is involved, for we are not in this case primarily construing a statute but rather a private agreement, and that Section 301(a) may not be read with the *Lincoln Mills* decision to give arbitrators more authority than the parties to the contract intended,[33] it may nonetheless be urged that the interest of the public—

[33] Cf. the reasoning of the Court in *NLRB v. Ins. Agents Union*, ___ U.S. ___, 4 L. Ed. 2d 454 (1960), referring to Labor Board authority to require good faith bargaining but not to prescribe more than the statute allows, no matter how desirable the end it seeks. As the Court there said, these are matters for Congress. 4 L. Ed. 2d at p. 469. In the same case, the dissent, 4 L. Ed. 2d at p. 471, referring for comparison to the *Lincoln Mills* decision, notes that a particular statutory provision must be applied in the light of the entire statutory

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as well as of employers, unions and employees—will best be served if the parties are put on notice that they must say, in these agreements, what they intend.

In *Lewis v. Benedict Coal Corp.*, Nos. 18 and 19, ... U.S. ....., 4 L. Ed. 2d 442, 450 (1960), the Court, referring to the *Lincoln Mills* decision, said that in the discharge of the function of fashioning a body of federal law for the enforcement of collective bargaining agreements, it was holding that in the circumstances of that case "the parties to a collective bargaining agreement must express their meaning in unequivocal words before they can be said to have agreed * * * ", in the light of the national labor policy; it is urged that the national labor policy requires decision by the Court that *in these circumstances*, also, in the absence of unequivocal words in the contract the parties have not agreed to arbitrate the question of contracting out work.

The desirability of careful contract drafting has not escaped the petitioner here, for in its widely-disseminated (to members and prospective members) booklet, *This is Your Union, The United Steelworkers of America*, privately printed, 1959, p. 6, under the heading, "Nothing is Overlooked in USWA (United Steelworkers of America)

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[33] (Continued)
purpose, with due regard to all its interrelated provisions. The jurisprudence under this statute shows its purpose to be to encourage unions and employers to make their own agreements, and to allow them to go to the *federal district court* for redress in their breach. Read together, the Taft-Hartley and Norris-LaGuardia Acts would mean, translated into terms of this case, that (1) the parties will be encouraged to bargain in good faith, but their collective bargaining agreement will not be disturbed, and they won't be made to bargain again during the contract term on something they have discussed and agreed to discard; (2) they will be encouraged to arbitrate their differences arising in the course of the contract term, but their agreement to arbitrate, once made, will be limited to what they intended thereby. Petitioner would construe the two-part collective bargaining-arbitration scheme to add an element of compulsion to each which Congress has not provided for.

Contracts," it declares: "No detail is overlooked in drafting the protective language of the agreement"; and, under the heading, "It's All in the Agreement," p. 10, "You don't run on guesswork when you work under a USWA contract. What is agreed to in negotiations is put down on paper. The company knows what is expected of it, and the worker always knows what the score is. A good contract has to be understood and enforced."

No longer may it be said that unions are so weak as to need help, from government or arbitrators, or in the nature of liberal construction of statutes to advance their progress;[34] or that they can't afford legal talent, if needed, for sound contract draftsmanship;[35] or that they have not the power to force management to concede a specific contract provision limiting contracting out of work, if they consider that more important than other concessions. If anything, the national labor policy of recent years has reflected in all labor legislation a trend toward aid of management against abuse by organized labor of its power.

There is little doubt, then, from the recent enormous growth of the labor movement, and the development of its power, backed by the great strength of the national labor policy which ensures its greater prosperity, that unions will quickly obtain in precise contract language all that they bargain for and can get in the give and take of collective bargaining. The question is—have they not

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[34] Cf. *NLRB v. Ins. Agents Int. Union*, 4 L. Ed. 2d 454, dissenting opinion, at p. 474; Velie, *Labor U.S.A.*, Harper & Brothers, N.Y., 1959, Chapters 15, 17, 19; Sweeney, *The United Steelworkers of America, 1936-1959*, privately printed; *U.S. News & World Report* (98% of employees in steel industry belong to the United Steelworkers' Union), Aug. 10, 1959, p. 23 *et seq.*, and Dec. 16, 1955, p. 23 *et seq.*; *Wall Street Journal*, Jan. 14, 1960, p. 6, "The Monopoly Power of Unions."

[35] Hardly a union exists that does not have ready help from wealthy international affiliates; unions today make business contracts covering financial, realty and other transactions involving millions of dollars.

matured sufficiently to warrant their having the responsibility of drafting their labor agreements with care? Who is to be hurt if they are made to do this? On the other hand, if that is not done, how is the employer to protect himself against vicarious interpretation of his limited agreement to arbitrate, except by rejecting *in toto* the whole idea of arbitration.[36] The argument that arbitration is to be encouraged, it would appear, should not overlook the possibility that arbitration as an institution may become discredited in the process of overindulgence.

The public policy, then, can best be served at this point in the development of our national labor policy by a holding which recognizes, as Congress has done in the Labor-Management Reporting and Disclosure Act of 1959, that unions have grown up; that they should be made to be responsible in the careful drafting of their labor agreements, toward the end that more, rather than less, certainty be encouraged in the contractual relationship. This is not to say that if those agreements provide for arbitration there should be any lessening of arbitration or its exhuberant vitality as now or in the future practiced; it is here set forth, however, that those agreements should satisfy the *federal courts* that they *do* provide for arbitration of the issue presented, or there will be no order of arbitration under Section 301(a).

The writers suggest precisely what is urged here as the solutions: (1) Put the parties on notice that, *however vague may be the remainder of their contract*, their agreement to arbitrate must say what it means or it

[36] Unions will not be apt to favor management-sought provisions making court determination of arbitrability a condition of arbitration, and any serious attempt by employers to negate arbitration of specific matters will soon demonstrate its impracticability. The protection against vicarious arbitration, if any, must come then from interpretation of the agreement to arbitrate.

will not be construed as a promise of arbitration.[37] (2) Urge for the courts' consideration all of the philosophy, industrial and arbitration background and reasoning which appeals to those arbitrators who distrust judicial "meddling"; our federal court system has shown its capacity to learn from progressive thinkers on the bench and in the academic world.[38] (3) If either party

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[37] Rosenfarb, "The Courts and Arbitration," New York University Sixth Annual Conference on Labor, Matthew Bender & Co., Inc., New York, 1953, p. 161 *et seq.*, at p. 178: "A more reliable key to arbitrational autonomy lies in the hands of the parties themselves. If the parties are minded to keep arbitration out of the courts they should address themselves with greater care and skill to the problems of drafting the arbitration clause." Aaron, p. 9, *Arbitration and the Law*, states: "* * * I do not think we can contribute to the solution of the problem * * * simply by adopting the slogan, 'Arbitrability for the arbitrators; judges go home.' Rather, we should urge employers and unions to include * * * specific procedures for dealing with issues of arbitrability." To the same effect, see Rose, p. 361, N.Y.U. 8th Ann. Conference; and Kramer, "Arbitration Under the Taft-Hartley Act," New York University Eleventh Annual Conference on Labor, Matthew Bender & Co., Inc., New York, 1958, p. 255 *et seq.*, at p. 282, and suggesting at pp. 283-284 that the problem, if any, is a matter for Congress. "This is a matter which the parties should consider when the agreement is negotiated," and they may escape the "evil" of judicial construction by putting arbitrability exclusively in the hands of the arbitrator. Cox, *Cases on Labor Law*, Foundation Press, Brooklyn, 4th Ed., 1958, pp. 775-776. *Cf. Lewis v. Benedict Coal Corp.*, 4 L. Ed. 2d 442, 450 (1960). It is not unusual, either, to find arbitration agreements broad enough to cover subjects not specified in the other provisions of the contract. Compare *Tenney Engineering, Inc. v. U. E.*, 174 F. Supp. 878 (D.C., N.J., 1959), with *Employees Assn. v. Procter & Gamble*, 172 F. Supp. 210 (D.C., Kan., 1959). And see Cox, p. 57, *Arbitration and the Law:* "I am persuaded that the conventional arbitration clause is not an agreement to allow an arbitrator to interpret its meaning, *thereby determining his own jurisdiction. The contrast between the wide-open clause and the conventional phraseology is too plain to be put down to inadvertence.* Apparently the parties choose it because one party, usually the employer, distrusts arbitration at least to the point of insisting upon the inclusion of some safeguard against the arbitrator's imposing significant obligations not contemplated by the agreement and beyond its scope. This clause * * * tells what (the arbitrator) *cannot* do. The protection sought by the employer would be drastically reduced by a construction which gave the arbitrator unlimited jurisdiction and merely warned against its exercise, for as a practical matter he would then have the power to impose obligations outside the contract limited only by his understanding and conscience. We can give effect to the underlying purpose only by excepting the interpretation of the arbitration clause from the general power to interpret, thus giving the court the duty to determine whether the claim which one side wishes to arbitrate gives rise to a dispute concerning the interpretation and application of the collective bargaining agreement.

"This does not mean that the court must decide every question antecedent to a determination of the merits of a grievance which might be thought to involve the arbitrability." Emphasis added.

[38] See footnotes 25, 26, 27.

to a contract wishes to confine the courts' participation in the arbitration process to enforcement of awards, let him expressly provide in his agreement that arbitrability shall be determined by the arbitrator.[39]

The first and third of these solutions would restrict the use of the federal courts to enforcement of arbitration awards under a limitation of authority to disturb (finality of arbitrations) which is well recognized in law and reason; there can be no serious quarrel with the wisdom[40] of our national policy in fostering arbitration. But, as long as the authority stems from Section 301(a), there can be no reconciliation between judicial construction of a legal instrument to determine whether the parties thereto have contracted to arbitrate, and the arbitration of the merits of a grievance by arbitrators who find arbitrability from the same facts at the same time relied upon to resolve the grievance itself.

In some quarters it is contended that the arbitration process will be hamstrung, and the federal courts cluttered, by suits to compel or avoid or enforce arbitration and arbitration awards, if the courts are permitted to determine arbitrability. This is not only wholly speculative; it is unrealistic and is not borne out by experience under the older Railway Labor Act or by the litigation since Section 301(a) of the Taft-Hartley Act was adopted *or* since the *Lincoln Mills* decision.[41]

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[39] See fn. 37.

[40] Arbitration is faster, less formal and legalistic, etc., than the legal system of the courts. Updegraff and McCoy, *Arbitration of Labor Disputes*, Commerce Clearing House, Chicago, 1946, p. 17.

[41] The number of applications of this kind made to the federal district courts is seen from examination of the reports in the labor law services to be inconsequential when compared to the hundreds of thousands of labor agreements in force and the thousands of arbitrators' decisions; moreover, comparatively few—of the few that reach the courts—present any problem beyond ordering a recalcitrant party to do what the agreement specifically requires. Analysis of the de-

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It has also been argued that less confusion would result, while fully protecting the rights of the parties, by letting arbitrators decide arbitrability in close cases, and then permitting review in the courts. This procedure not only would be contrary to a long established principle of our legal system, which is to take up first things first, but would not save time or confusion if there could be review of the arbitrators' rulings on arbitrability prior to the merits, would waste time and expense if there were reversal after the decision on the merits, and would complicate the issue of arbitrability if the arbitrator deferred ruling thereon until after hearing the merits. The decisions of the arbitrators may combine the issue of arbitrability with the merits of the grievance, making indistinguishable the legal and factual bases of the award. Cf. Justin, "*Arbitrability and the Arbitrator's Jurisdiction*," p. 1, at p. 16 ("tenuous line"), Proceedings of Ninth Annual Meeting of National Academy of Arbitrators, BNA, 1956. Unless the threshold judicial decision of arbitrability is available in the relatively few cases where it will be necessary, the arbitration process and its integrity in the enforcement of awards will be injured rather than benefitted.

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[41] (Continued)
cisions in the latest complete volume of Labor Arbitration Reports, No. 32 (Bureau of National Affairs, Inc., Washington, D.C., 1960) shows: Of the total of 356 decisions reported, 290 were by arbitrators, 30 were by New York courts under that state's labor arbitration statute, 12 were by all state courts in all other states combined, and 24 were by federal district and appellate courts combined. In these 24 cases decided by federal courts, only 18 involved the question of arbitrability; and in 12 of those 18 cases the federal courts issued orders compelling arbitration while in only 6 (including the instant *Warrior & Gulf* case) was the claim of arbitrability rejected.

See also, Smith & Merrifield, pp. 871, 882, *Labor Relations Law*, "only a very small percentage" of disputes under contracts go to arbitration, and "only a minute fraction * * * get to the courts." Moreover, a refusal to arbitrate risks damages at law for contract breach. Finally, the deterrent of a possible strike, then or at expiration of the agreement, poses a powerful reason against insisting upon a court ruling as to arbitrability. In the cases of this kind arising since *Lincoln Mills*, only a handful have resulted in refusal to order arbitration.

However desirable it might be, there can be no reliance on the alternative of judicial enforcement or review of an arbitrator's decision to protect the parties in a situation of the kind presented here, and a complex problem would only be made more complex by opening the way for a variety of exceptions to the established policy of disturbing arbitration awards only where fraud, bias and the like are present.[42] And where would the advantage be if the courts were to have to handle (in this situation, the cases would be infinitely more numerous) petitions for enforcement or review in the manner of NLRB orders?[43]

The judgment below is supported by public policy considerations, it is emphasized, because the national labor policy advances the cause of labor arbitration as a means of promoting industrial peace when it embraces the theory of responsible contract draftsmanship.

IV.

Petitioner's Contentions.

Petitioner over-simplifies and over-generalizes the problem here by seeking to treat it as one with cases of quite different character.

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[42] Errors of law or of fact will not, as a rule, permit setting aside an arbitration award. Smith & Merrifield, p. 882, *Labor Relations Law*. The arbitrator's award will not be disturbed, it is final on the law and facts, "unless perverse misconstruction or positive misconduct" or fraud or corruption by the arbitrator is found. *Matter of Wilkins*, 169 N.Y. 494, 496, 62 N.E. 575 (1902). *U. S. v. Wunderlich*, 342 U.S. 98, 100 (1951). Petitioner argues to same effect, Br. pp. 27, 44, when confronted with the problems of *United Steelworkers v. Enterprise Wheel and Car Corp.*, No. 538. The difficulty is increased by the provision almost invariably found in the agreement to arbitrate, in order to insure the advantages of the process, that the decision of the arbitrator shall be final, i.e., the parties forfeit their right of court review. R. 17; *Union Contract Clauses*, CCH, p. 614, ¶ 51,557.20; petitioner's Br. herein, p. 48, last paragraph.

[43] These have greatly occupied the Circuit Courts of Appeal, yet only pass from *one* tribunal, the Labor Board; review of arbitration decisions from all over the country would invite chaos. Arbitrability, without the confusion of a complex ruling first by the arbitrator, involves a narrow issue.

There are sharp distinctions between the case at bar and each of the other cases set with it for argument on the same day. *United Steelworkers of America v. American Manufacturing Company*, CA-6, 1959, 264 F. 2d 624, No. 360, does not at all involve arbitrability, that is, interpretation of the agreement to arbitrate, but, rather, whether the Court should order arbitration on a patently frivolous grievance; *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, CA-4, 1959, 269 F. 2d 327, No. 538, likewise does not involve arbitrability, but, rather, the power of the Court to modify an arbitration award. Nor are the facts the same here as in *Lodge 1912, International Association of Machinists v. United States Potash Company*, CA-10, 1959, 270 F. 2d 496, pet. for cert. filed, No. 554, U.S., Nov. 30, 1959, where, among other things, the parties had not negotiated on the subject matter of the grievance, and where the work contracted out was performed in the plant of and with facilities of the employer for whom the work was done, rather than, as here, on floating equipment of the employer (respondent) at shipyards with specialized facilities. Pet. brief in No. 554, *U. S. Potash Co. v. Lodge 1912, I.A.M.*, now pending in this Court on petition for certiorari, pp. 4, 5. There, moreover, is room for difference in the interpretation of commitments to arbitrate in different cases. The petitioner may not, either, derive comfort from the *Cameron Iron Works* case, CA-5, 1958, 257 F. 2d at p. 471, containing dicta to the effect that where broad arbitration language is present in an agreement the court ought not to look beyond it in deciding whether to compel arbitration, for that rule begs the question since the effect of it is merely to say that where the contract provides for arbitration, then arbitration shall be ordered.

As this Court has noted in stemming the flood of

Labor Board fact-review cases, *Universal Camera, supra*, 340 U.S., at p. 490-1, and in *NLRB v. Pittsburgh S.S. Co.*, 340 U.S., at p. 502, there may be a difference of views between courts even on the same facts, but that does not justify the conclusion that one *has* interpreted "only to determine whether the grievance dispute can be fairly said to present a question as to the interpretation or application of the contract," *Lodge 1912, Int. Assn. of Machinists v. U. S. Potash Co.*, 270 F. 2d, at p. 498, while the other *has not;* especially where there is such potent support for the judgment of the District Court here.

Warrior & Gulf is indeed different from *Enterprise Wheel and Car Corp.* and *American Manufacturing.* These three cases cannot be decided alike on the premise that they all involve interpretation of the same statutory provision, any more than the scores of other cases under the National Labor Relations Act or Taft-Hartley Act can be decided alike in situations differing as to facts and issues. Petitioner would have it understood that all arbitration provisions are basically the same, equally broad, and provide, with the substantive clauses of the contract, a code. The argument runs as if the code were like pre-emption, *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 481 (1955), a field which cannot be invaded by the courts but is pre-empted for arbitration. The fallacy in the argument is that as federal jurisdiction is a prerequisite to federal pre-emption, the jurisdiction of the arbitrator—or arbitrability—must be demonstrated to the court before he may act. There can be no other reading of Section 301(a), for, as all the courts and writers have noted, we have here a private, consensual agreement and the arbitrator is limited to that authority which the parties have conferred on him. He cannot determine his own *authority* from an interpretation of the recognition, seniority, discrimination, or other pro-

visions of the contract—and the language speaking to his authority must be interpreted as *contracts* are interpreted.

In pitching its case on the bald assertion, Br., p. 50, that any *claim* that a contract is violated makes that *claim* arbitrable, petitioner heavily relies on the theory that grievance arbitration is the *quid pro quo* for an absolute agreement not to strike, inferring that it has given up its right to strike, so it should be allowed to air its claim before an arbitrator. Would the same argument be made if it agreed not to strike and still had *no* agreement to arbitrate? Or, if the agreement to arbitrate expressly excluded therefrom the subject of contracting out work? Certainly it cannot be said that whenever a no-strike clause and an arbitration clause appear in the same contract, every conceivable dispute between the parties must be sent to arbitration if demanded by either. See, for example, *Employees Assn. v. Procter & Gamble*, 172 F. Supp. 210 (D.C., Kan., 1959), where arbitration was qualified. Justin, at p. 26 *op. cit.* p. 34, *supra*, states: " • • • when the clause limits arbitration to • • • 'the interpretation, application, or claimed violation • • • of this Agreement,' is it not equally reasonable to assume that the parties did *not* intend their private arbitration system to be equivalent in scope with the 'no-strike—no lockout' clause?"

Petitioner's quest has been exhaustive for a way around the *Lincoln Mills* direction requiring the district courts to pursue "federal law which the courts must fashion from the policy of our national laws." 353 U.S., at p. 457. The quest, it is emphasized, is for "a way around." Petitioner declares that the arbitrators' disappointment with the *Lincoln Mills* holding is "misdirected," Br., p. 51, and seeks to have the decision

interpreted to narrow the scope of the district court's authority to the mere ministerial function of lending its equity power to the arbitrator without any exercise of judgment or discretion or any contract interpretation, however slight.

It would appear that petitioner deems it helpful to have federal court support, it indeed embraces the use of the federal injunction to compel and enforce arbitration awards, but at the same time it eschews federal judicial thinking.

Petitioner argues, Br. pp. 44, 50, for an abstract principle of blind acceptance of the absolute autonomy of arbitration. It wants recognition of grievance arbitration as part of the continuing process of collective bargaining, Br. p. 39, and states, Br. p. 35, that because it is impossible to anticipate and provide for every problem that may arise in the course of a collective bargaining agreement, the contract is just a negotiated standard "with all the necessities for compromise and even deliberate ambiguity which such negotiations often require * * * ." But, even if so, can this be an excuse for imposing negotiation or compromise or allowing arbitration of a *claim* of contract breach based on provisions like lockout, discrimination, seniority and recognition when the parties have already bargained over the claim and, by calling off the fight, thereby agreed not to make any restriction on management's continued freedom to contract out repair work? As said in *U. S. Steel Corp. v. Nichols*, CA-6, 1956, 229 F. 2d 396, at p. 401, cert. den., 351 U.S. 950:

> "Against such a background of custom, protests and negotiations it can not be said that the issue * * * was inadvertently overlooked in executing the * * * contract * * * ."

The theories expounded by petitioner ignore these fundamentals:

(1) There is a point at which the obligation to bargain ceases. For example, what would there be to discuss, bargain, or arbitrate on a *claim* for $3 an hour if the contract provided that all employees were to be paid $2 per hour for all work done? Would it make any difference if the contract made no reference whatever as to rate of pay after the union had vigorously sought, and failed, in the negotiation of the contract, to set a fixed hourly rate of pay? *Matter of Jacobs Mfg. Co.*, 94 NLRB 1214, in effect holds, with obvious force, that it would destroy the stabilization purpose of labor contracts to allow unions to upset a bargain which as much includes that which the parties *affirmatively failed to agree on* as what they *affirmatively did agree on.* If, as petitioner contends, Br. p. 30, the Court must construe Section 301(a) as part of the scheme of bargaining in a *labor relations* statute, as distinguished from an *arbitration* statute, then in *Warrior & Gulf* it must be recognized that as a matter of law, *Jacobs Mfg. Co.*, outside contracting has been excluded from the continuing, pet. Br. p. 39, bargaining obligation which terminates, pet. Br. p. 40, in arbitration.

(2) Section 301(a), insofar as it applies to enforcing agreements to arbitrate, requires *court* construction of such agreements. If Section 301(a) were not necessary to the enforcement of these agreements, petitioner's thesis might, under our national policy, be valid. But it cannot, in view of the plain language of the statute, call upon the court to act with eyes closed.

That there may be abuses of court judgment, authority or discretion in cases of this kind may not be

disputed, for no one is perfect, but such abuses can be corrected by progressive litigation. The Court has admonished that the substantive law under Section 301(a) must be "fashioned," it cannot be settled *in toto* in this one case or in the three cases set consecutively for argument. For the *Warrior & Gulf* case it should suffice to hold that where it is undisputed, as here, that the parties negotiated on a restriction which did not get into the contract, and for years accepted the interpretation that the restriction was not arbitrable, the District Court did not abuse its authority under Section 301(a) to decree that the arbitrator had no jurisdiction over it, since its exercise was consistent with the federal labor policy under the National Labor Relations Act as interpreted by the Labor Board in the *Jacobs Manufacturing* case. To what extent the court may go in exercising its authority to determine arbitrability, this case will be but one criterion in the development of the federal law.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

NATIONAL LABOR RELATIONS ACT

29 U.S.C. Section 151. The denial by *some* employers of the right of employees to organize and the refusal by *some* employers to accept the procedure of collective bargaining lead to strikes * * *.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

29 U.S.C. Section 160(l). Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), * * * the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the

filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. * * * Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony * * *.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

29 U.S.C. Section 158(e). It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (d) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any

other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

THE RAILWAY LABOR ACT

45 U.S.C. Section 153. NATIONAL RAILROAD ADJUSTMENT BOARD - GRIEVANCES - INTERPRETATION OF AGREEMENTS.

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided —

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose

benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

* * * * *

45 U.S.C. Section 157. First. whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

* * * * *

45 U.S.C. Section 159. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulation of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however*, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further*, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

UNITED STATES ARBITRATION ACT

9 U.S.C. Section 3. STAY OF PROCEEDINGS WHERE ISSUE THEREIN REFERABLE TO ARBITRATION.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. Section 4. FAILURE TO ARBITRATE UNDER AGREEMENT: PETITION TO UNITED STATES COURT HAVING JURISDICTION FOR ORDER TO COMPEL ARBITRATION: NOTICE AND SERVICE THEREOF: HEARING AND DETERMINATION.

* * * * *

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, de-

mand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

SUPREME COURT OF THE UNITED STATES

No. 443.—October Term, 1959.

United Steelworkers of America, Petitioner, v. Warrior and Gulf Navigation Company.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 20, 1960.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent transports steel and steel products by barge and maintains a terminal at Chicasaw, Alabama, where it performs maintenance and repair work on its barges. The employees at that terminal constitute a bargaining unit covered by a collective bargaining agreement negotiated by petitioner union. Respondent between 1956 and 1958 laid off some employees, reducing the bargaining unit from 42 to 23 men. This reduction was due in part to respondent contracting maintenance work, previously done by its employees, to other companies. The latter used respondent's supervisors to lay out the work and hired some of the laid-off employees of respondent (at reduced wages). Some were in fact assigned to work on respondent's barges. A number of employees signed a grievance which petitioner presented to respondent, the grievance reading:

> "We are hereby protesting the Company's actions, of arbitrarily and unreasonably contracting out work to other concerns, that could and previously has been performed by Company employees.
>
> "This practice becomes unreasonable, unjust and discriminatory in view of the fact that at present

there are a number of employees that have been laid off for about 1 and ½ years or more for allegedly lack of work.

"Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lockout, of a number of the employees who would otherwise be working were it not for this unfair practice."

The collective agreement had both a "no strike" and a "no lockout" provision. It also had a grievance procedure which provided in relevant part as follows:

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner:

"A. For Maintenance Employees:

"First, between the aggrieved employees, and the Foreman involved; Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic."

. . . . . .

"Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly peti-

tion the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final."

Settlement of this grievance was not had and respondent refused arbitration. This suit was then commenced by the union to compel it.[1]

The District Court granted respondent's motion to dismiss the complaint. 168 F. Supp. 702. It held after hearing evidence, much of which went to the merits of the grievance, that the agreement did not "confide in an arbitrator the right to review the defendant's business judgment in contracting out work." *Id.*, at 705. It further held that "the contracting out of repair and maintenance work, as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here." *Ibid.* The Court of Appeals affirmed by a divided vote, 269 F. 2d 633, the majority holding that the collective agreement had withdrawn from the grievance procedure "matters which are strictly a function of management" and that contracting-out fell in that exception. The case is here on a writ of certiorari. 361 U. S. 912.

We held in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, that a grievance arbitration provision in a collective agreement could be enforced by reason of § 301 (a) of

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[1] Section 301 (a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (a), provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." See *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448.

the Labor Management Relations Act[2] and that the policy to be applied in enforcing this type of arbitration was that reflected in our national labor laws. *Id.*, at 456–457. The present federal policy is to promote industrial stabilization through the collective bargaining agreement.[3] *Id.*, at 453–454. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.[4]

Thus the run of arbitration cases, illustrated by *Wilko* v. *Swan*, 346 U. S. 427, become irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the

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[2] Note 1, *supra*.

[3] In § 8 (d) of the 1947 Act, 29 U. S. C. § 158 (d), Congress indeed provided that where there was a collective agreement for a fixed term the duty to bargain did not require either party "to discuss or agree to any modification of the terms and conditions contained in" the contract. And see *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332.

[4] Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the "*quid pro quo*" for the agreement not to strike. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 455.

draftsmen cannot wholly anticipate. See Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1004–1005. The collective agreement covers the whole employment relationship.[5] It calls into being a new common law—the common law of a particular industry or of a particular plant. As one observer has put it: [6]

> ". . . [I]t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules –

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[5] "Contracts which ban strikes often provide for lifting the ban under certain conditions. Unconditional pledges against strikes are, however, somewhat more frequent than conditional ones. Where conditions are attached to no-strike pledges, one or both of two approaches may be used: certain *subjects* may be exempted from the scope of the pledge, or the pledge may be lifted after certain *procedures* are followed by the union. (Similar qualifications may be made in pledges against lockouts.)

"Most frequent conditions for lifting no-strike pledges are: (1) The occurrence of a deadlock in wage reopening negotiations; and (2) violation of the contract, especially non-compliance with the grievance procedure and failure to abide by an arbitration award.

"No-strike pledges may also be lifted after compliance with specified procedures. Some contracts permit the union to strike after the grievance procedure has been exhausted without a settlement, and where arbitration is not prescribed as the final recourse. Other contracts permit a strike if mediation efforts fail, or after a specified cooling-off period." Collective Bargaining Negotiations and Contracts, Bureau of National Affairs, Inc., 77:101.

[6] Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498–1499 (1959).

governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words."

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations. Rather it is between having that relationship governed by an agreed upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces. The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over and extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions; some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and

good faith." Shulman, *supra*, at 1005. Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement.

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . ." Shulman, *supra*, at 1016.

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant

party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[7]

We do not agree with the lower courts that contracting-out grievances were necessarily excepted from the grievance procedure of this agreement. To be sure the agreement provides that "matters which are strictly a function of management shall not be subject to arbitration." But it goes on to say that if "differences" arise or if "any local trouble of any kind" arises, the grievance procedure shall be applicable.

Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditons. A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute

[7] It is clear that under both the agreement in this case and that involved in *American Manufacturing Co., ante*, p. —, the question of arbitrability is for the courts to decide. Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1508–1509. Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose.

no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes. This comprehensive reach of the collective bargaining agreement does not mean, however, that the language, "strictly a function of management" has no meaning.

"Strictly a function of management" might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge. But if courts, in order to determine arbitrability, were allowed to determine what is permitted and what is not, the arbitration clause would be swallowed up by the exception. Every grievance in a sense involves a claim that management has violated some provision of the agreement.

Accordingly, "strictly a function of management" must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion. Respondent claims that the contracting-out of work falls within this category. Contracting-out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.[8] A specific collective bargaining agreement may exclude contracting-out from the grievance procedure. Or a written collateral agreement may make clear that contracting-out

[8] See *Celanese Corp. of America*, 33 Lab. Arb. 925, 941 (1959), where the arbiter in a grievance growing out of contracting-out work said:

"In my research I have located 64 published decisions which have been concerned with this issue covering a wide range of factual situations but all of them with the common characteristic—i. e., the contracting-out of work involved occurred under an Agreement that contained no provision that specifically mentioned contracting-out of work."

was not a matter for arbitration. In such a case a grievance based solely on contracting-out would not be arbitrable. Here, however, there is no such provision. Nor is there any showing that the parties designed the phrase "strictly a function of management" to encompass any and all forms of contracting-out. In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.

The grievance alleged that the contracting-out was a violation of the collective bargaining agreement. There was, therefore, a dispute "as to the meaning and application of the provisions of this Agreement" which the parties had agreed would be determined by arbitration.

The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting-out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 443.—October Term, 1959.

United Steelworkers of America, Petitioner, *v.* Warrior and Gulf Navigation Company.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 20, 1960.]

Mr. Justice Whittaker, dissenting.

Until today, I have understood it to be the unquestioned law, as this Court has consistently held, that arbitrators are private judges chosen by the parties to decide particular matters specifically submitted; [1] that the contract under which matters are submitted to arbitrators is at once the source and limit of their authority and power; [2] and that their power to decide issues with finality, thus ousting the normal functions of the courts, must rest upon a clear, definitive agreement of the parties, as such powers can never be implied. *United States* v. *Moorman*, 338 U. S. 457, 462; [3] *Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298, 309. [4] See also *Fernandez & Hnos*

[1] "Arbitrators are judges chosen by the parties to decide the matter submitted to them." *Burchell* v. *Marsh*, 17 How. 334, 349.

[2] "The agreement under which [the arbitrators] were selected *was at once the source and limit of their authority*, and the award, to be binding, must, in substance and form, conform to the submission." *Continental Ins. Co.* v. *Garrett*, 125 F. 589, 590 (C. A. 6th Cir.)—Opinion by Judge, later Mr. Justice, Lurton. (Emphasis added.)

[3] "It is true that *the intention of the parties to submit their contractual disputes to final determination outside the courts should be made manifest by plain language.*" *United States* v. *Moorman*, 338 U. S. 457, 462. (Emphasis added.)

[4] "To make such [an arbitrator's] certificate conclusive *requires plain language in the contract.* It is not to be implied." *Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298, 309. (Emphasis added.)

v. *Rickert Mills*, 119 F. 2d 809, 815 (C. A. 1st Cir.); *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 299, 169 N. E. 386, 391;[6] *Continental Milling & Feed Co.* v. *Doughnut Corp.*, 186 Md. 669, 48 A. 2d 447, 450; *Jacob* v. *Weisser*, 207 Pa. 484, 56 A. 1065, 1067.[7] I believe that the Court today departs the established principles announced in these decisions.

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[5] "A party is never required to submit to arbitration any question which he has not agreed so to submit, and contracts providing for arbitration *will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted.*" *Fernandez & Hnos* v. *Rickert Rice Mills*, 119 F. 2d 809, 815 (C. A. 1st Cir.). (Emphasis added.)

[6] In this leading case, Judge, later Mr. Justice, Cardozo said:

"The question is one of intention, to be ascertained by the same tests that are applied to contracts generally . . . . No one is under a duty to resort to these conventional tribunals, however helpful their processes, *except to the extent that he has signified his willingness.* Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others." *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 299, 169 N. E. 386, 391. (Emphasis added.)

[7] In this case, the Court, after quoting Judge Cardozo's language in *Marchant*, *supra*, saying that "the question is one of intention," said:

"Sound policy demands that the terms of an arbitration *must not be strained to discover power to pass upon matters in dispute, but the terms must be clear and unmistakable to oust the jurisdiction of the Court, for trial by jury cannot be taken away in any case merely by implication.*" *Continental Milling & Feed Co.* v. *Doughnut Corp.*, 186 Md. 669, 676, 48 A. 2d 447, 450. (Emphasis added.)

[8] "But, under any circumstances, before the decision of an arbitrator can be held final and conclusive, it must appear, as was said in *Chandley Bros.* v. *Cambridge Springs*, 200 Pa. 230, 49 Atl. 772, *that power to pass upon the subject-matter, is clearly given to him. 'The terms of the agreement are not to be strained to discover it. They must be clear and unmistakable to oust the jurisdiction of the courts; for trial by jury cannot be taken away by implication merely in any case.'*" *Jacob* v. *Weisser*, 207 Pa. 484, 489, 56 A. 1065, 1067. (Emphasis added.)

Here, the employer operates a shop for the normal maintenance of its barges, but it is not equipped to make major repairs, and accordingly the employer has, from the beginning of its operations more than 19 years ago, contracted out its major work. During most, if not all, of this time the union has represented the employees in that unit. The District Court found that "[t]hroughout the successive labor agreements between these parties, including the present one, . . . [the union] has unsuccessfully sought to negotiate changes in the labor contract, and particularly during the negotiation of the present labor agreement, . . . which would have limited the right of the [employer] to continue the practice of contracting out such work." 168 F. Supp. 702, 704–705.

The labor agreement involved here provides for arbitration of disputes respecting the interpretation and application of the agreement and, arguably, also some other things. But the first paragraph of the arbitration section says: "[M]atters which are strictly a function of management shall not be subject to arbitration under this section." Although acquiescing for 19 years in the employer's interpretation that contracting out work was "strictly a function of management," and having repeatedly tried—particularly in the negotiation of the agreement involved here—but unsuccessfully, to induce the employer to agree to a covenant that would prohibit it from contracting out work, the union, after having agreed to and signed the contract involved, presented a "grievance" on the ground that the employer's contracting out work, at a time when some employees in the unit were laid off for lack of work, constituted a partial "lockout" of employees in violation of the antilockout provision of the agreement.

Being unable to persuade the employer to agree to cease contracting out work or to agree to arbitrate the "grievance," the union brought this action in the District Court,

under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, for a decree compelling the employer to submit the "grievance" to arbitration. The District Court, holding that the contracting out of work was, and over a long course of dealings had been interpreted and understood by the parties to be, "strictly a function of management," and was therefore specifically excluded from arbitration by the terms of the contract, denied the relief prayed, 168 F. Supp. 702. The Court of Appeals affirmed, 269 F. 2d 633, and we granted certiorari. 361 U. S. 912.

The Court now reverses the judgment of the Court of Appeals. It holds that the arbitrator's source of law is "not confined to the express provisions of the contract," that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute," that "[d]oubts [of arbitrability] should be resolved in favor of coverage," and that when, as here, "a no-strike clause is included in the agreement, then . . . everything that management does is subject to [arbitration]." I understand the Court thus to hold that the arbitrators are not confined to the express provisions of the contract, that arbitration is to be ordered unless it may be said with positive assurance that arbitration of a particular dispute is excluded by the contract, that doubts of arbitrability are to be resolved in favor of arbitration, and that when, as here, the contract contains a no-strike clause, everything that management does is subject to arbitration.

This is an entirely new and strange doctrine to me. I suggest, with deference, that it departs both the contract of the parties and the controlling decisions of this Court. I find nothing in the contract that purports to confer upon arbitrators any such general breadth of private judicial power. The Court cites no legislative or judicial authority

that creates for or gives to arbitrators such broad general powers. And I respectfully submit that today's decision cannot be squared with the statement of Judge, later Mr. Justice, Cardozo in *Marchant* that "no one is under a duty to resort to these conventional tribunals, however helpful their process, *except to the extent that he has signified his willingness.* Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thoughts of others," 252 N. Y., at 299, 169 N. E., at 391 (emphasis added); nor with his statement in that case that "[t]he question is one of intention, to be ascertained by the same tests that are applied to contacts generally," *id.*, nor with this Court's statement in *Moorman*, "that the intention of the parties to submit their contractual disputes to final determination outside the courts *should be made manifest by plain language*," 338 U. S., at 462 (emphasis added); nor with this Court's statement in *Hensey* that: "To make such [an arbitrator's] certificate conclusive *requires plain language in the contract.* It is not to be implied." 205 U. S., at 309. (Emphasis added.) "A party is never required to submit to arbitration any question which he has not agreed so to submit, and *contracts providing for arbitration will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted.*" *Fernandez & Hnos* v. *Rickert Rice Mills*, *supra*, 119 F. 2d, at 815 (C. A. 1st Cir.). (Emphasis added.)

With respect, I submit that there is nothing in the contract here to indicate that the employer "signified [its] willingness" (*Marchant*, *supra*, at 391) to submit to arbitrators whether it must cease contracting out work. Certainly no such intention is "made manifest by plain language" (*Moorman*, *supra*, at 462), as the law "requires," because such consent "is not to be implied." *Hensey*, *supra*, at 309.) To the contrary, the parties by their con-

duct over many years interpreted the contracting out of major repair work to be "strictly a function of management," and if, as the concurring opinion suggests, the words of the contract can "be understood only by reference to the background which gave rise to their inclusion," then the interpretation given by the parties over 19 years to the phrase "matters which are strictly a function of management" should logically have some significance here. By their contract, the parties agreed that "matters which are strictly a function of management shall not be subject to arbitration." The union over the course of many years repeatedly tried to induce the employer to agree to a covenant prohibiting the contracting out of work, but was never successful. The union again made such an effort in negotiating the very contract involved here, and, failing of success, signed the contract, knowing, of course, that it did not contain any such covenant, but that, to the contrary, it contained, just as had the former contracts, a covenant that "matters which are strictly a function of management shall not be subject to arbitration." Does not this show that, instead of signifying a willingness to submit to arbitration the matter of whether the employer might continue to contract out work, the parties fairly agreed to exclude at least that matter from arbitration? Surely it cannot be said that the parties agreed to such a submission by any "plain language." *Moorman*, *supra*, at 462, and *Hensey*, *supra*, at 309. Does not then the Court's opinion compel the employer "to submit to arbitration [a] question which [it] has not agreed so to submit"? (*Fernandez & Hnos*, *supra*, at 815.)

Surely the question whether a particular subject, or class of subjects are or are not made arbitrable by a contract is a judicial question, and if, as the concurring opinion suggests, "the Court may conclude that [the contract] commits to arbitration any [subject or class of subjects]."

it may likewise conclude that the contract does not commit such subject or class of subjects to arbitration, and "[w]ith that finding the Court will have exhausted its function" no more nor less by denying arbitration than by ordering it. Here the District Court found, and the Court of Appeals approved its finding, that by the terms of the contract, as interpreted by the parties over 19 years, the contracting out of work was "strictly a function of management" and "not subject to arbitration." That finding, I think, should be accepted here. Acceptance of it requires affirmance of the judgment.

I agree with the Court that courts have no proper concern with the "merits" of claims which by contract the parties have agreed to submit to the exclusive jurisdiction of arbitrators. But the question is one of jurisdiction. Neither may entrench upon the jurisdiction of the other. The test is: Did the parties in their contract "manifest by plain language" (*Moorman*, *supra*, at 462) their willingness to submit the issue in controversy to arbitrators? If they did, then the arbitrators have exclusive jurisdiction of it, and the courts, absent fraud or the like, must respect that exclusive jurisdiction and cannot interfere. But if they did not, then the courts must exercise their jurisdiction, when properly invoked, to protect the citizen against the attempted use by arbitrators of pretended powers actually never conferred. That question always is, and from its very nature must be, a judicial one. Such was the question presented to the District Court and the Court of Appeals here. They found the jurisdictional facts, properly applied the settled law to those facts, and correctly decided the case. I would therefore affirm the judgment.